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HEADQUARTERS, DEPARTMENT OF THE ARMY
JULY 1967

PREFACE

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THE DECISION TO EXERCISE POWER—A PERSPECTIVE ON ITS FRAMEWORK IN INTERNATIONAL LAW*

By Lieutenant Commander James E. Toms **

The author discusses the self-help measures of retorsion, reprisal, and intervention, as they relate to international law. His analysis includes the application of these measures in such contemporary crises as the Dominican Republic, Southern Rhodesia, and Vietnam. The author concludes that the world community is not yet ready for a "force monopoly" by the United Nations and that, meanwhile, individual states should exercise power in accordance with established international law and the ideals expressed in the United Nations Charter.

I. INTRODUCTION

International law is a discipline conceived to bring order to the relationships of a number of states asserting certain rights. Indicative of these rights is the expression of Chief Justice Marshall: "The world [is] composed of distinct sovereignties, possessing equal rights and equal independence. . . ."[1] It might be said that these rights and their reciprocal obligations are given credence by states applying standards and rules which are designed to define and implement the rights and obligations.

As states emerged and the international community developed, it became apparent that the absence of central authority for this community resulted in ad hoc accommodations amongst the states which depended as much upon relative physical capacities of the states involved as upon any theory of sovereign equality. But even in such a loosely knit society, where resort

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* The views expressed are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** USN; Assistant Legal Officer, U.S. Naval Support Activity, Da Nang, Republic of Vietnam; B.S.L., 1954, University of Minnesota; LL.B., 1957, William Mitchell College of Law, St. Paul, Minnesota; admitted to practice before the bars of the State of Minnesota and the United States Supreme Court.

[1] Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

to self-help measures of violence could not be discounted, if an interest was deemed important enough, a lexicon grew up, categorizing and setting legal frameworks for testing the propriety of a variety of coercive measures which did not amount to the ultimate measure of war. Although war itself was a measure available to states,[3] it was useful to recognize and employ measures of less generalized effect when limited ends were sought.[3]

> The regulation of the resort to war itself constitutes the ultimate problem toward the solution of which the world has been groping. Along the way it has been possible to secure a measure of agreement on lesser problems.[4]

Although the United Nations Charter restricts the use or threat of force by states,[5] it is useful to examine the practice of states prior to that treaty and relate the prior practice to current practice. For, while the purposes of the United Nations Organization are manifestly laudible, its effectiveness in settling international disputes or assisting in such settlement has been less than ideal.[6] Meantime, states do have reference to pre-

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[3] "[D]espite earlier efforts by jurists and moralists to distinguish between *bellum justum* and *bellum injustum*, international law had given up the attempt to regulate recourse to war, the most extreme form of the use of force . . . ." BRIERLY, THE LAW OF NATIONS 397–98 (6th ed. Waldock 1963) (italics in original; footnote omitted).

[3] On occasion, measures employed have been declared beyond the competency attributed to force short of war, and the acting states have regularized their conduct simply by declaring war. Such was the case of the blockade instituted against Venezuela by Great Britain, Germany, and Italy in 1902, which they intended to enforce against third states. When the United States objected that pacific blockade could not affect ships of third states, Great Britain declared she was at war with Venezuela. *See* COLOMBOS, INTERNATIONAL LAW OF THE SEA 426 (5th rev. ed. 1962).

[4] JESSUP, A MODERN LAW OF NATIONS 157 (1952).

[5] Charter of the United Nations, 26 June 1945, art. 2(3), 59 Stat. 1031 (1945), T.S. No. 93 [hereafter cited as U.N. Charter], states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

[6] Baltimore Sun, 25 July 1966, at A2, col. 5, carried this item:

"Israelis Warned of War Danger

"Damascus, Syria, July 24 (AP)—Syria warned Israel today that any further raids on Syrian territory will definitely lead to war.

"Israel ten days ago bombed Arab operations designed to divert the Jordan River in Syria. The Syrian Foreign Ministry said, in a statement on the eve of a United Nations Security Council meeting which will take up Syrian protest against the air raid, that the debate would be the United Nations last chance to prevent war.

existing criteria for justifying forceful action, albeit they now feel more compunction to relate their action to self-defense as that concept is interpreted under article 51 of the United Nations Charter.[7]

Self-help measures have generally been categorized as retorsion, reprisals, intervention, and self-defense.[8] These categories are a useful device for orderly discussion of this area of international law. But it must be borne in mind that there is no intent to imply that the categories are mutually exclusive. However, as will be seen later, retorsion and reprisal may be considered mutually exclusive in that bona fide retorsions are acts within the competence of the state regardless of provocation, whereas reprisals depend for their justification upon their being in response to an illegal act of another state.[9]

It is important to realize that in the jurisprudence of international law, terminology is sometimes employed simply for its descriptive value without regard to a precise legal definition. So, we find the terms "boycott" and "embargo" in a variety of situations, and we cannot rely on the use of the term as indicative of legal ramifications.

"Boycott" is a term applied in municipal as well as international contexts as a label for a practiced refusal to do business. The United States bans against imports from Cuba and Red China are instances of boycott which need not be justified as either retorsions or reprisals, since the United States is not obligated by treaty or otherwise to allow imports from those sources. Some boycotts must, however, depend upon the conditions of reprisal for justification, as will be seen later.

"Embargo" is a term applied to many situations which will be discussed within the general heading of reprisals. Not all of

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"This might be Syria's last complaint to the international body if the nations concerned (Security Council member states) fail to stand by right and justice by condemning Israeli aggression, the statement said.

"Arabs have been driven to despair by the United Nations inability to enforce any of its resolutions on the Palestine question during the last eighteen years, it added. This failure gives the Arabs the right to search for other means to defend themselves against constant threats and repeated insults."

[7] Article 51 is discussed subsequently.

[8] BRIERLY, THE LAW OF NATIONS 398 (6th ed. Waldock 1963); *see generally* II OPPENHEIM'S INTERNATIONAL LAW 132–76 (7th ed. Lauterpacht 1952) [hereafter cited as II OPPENHEIM], use this classification.

[9] *See* BRIERLY, *supra* note 8, at 399.

the applications of the term have reference to reprisal. The underlying circumstances must be discovered to understand the sense of the term in each instance.

II. RETORSION

A. *GENERAL*

Aside from any limitations imposed by the United Nations Charter, there are, in a world of sovereign states, a multitude of actions within the legal competence of states. Many of these actions may be considered discourteous or unfair to other states, yet nonetheless amongst the prerogatives of the acting state. Thus, states have exacted exorbitant tariffs on the importation of certain products, or even prohibited importation of the products of particular states, regulated immigration on a basis discriminatory against nationals of particular states, or refused to allow ships of a particular state access to ports.

If no treaty violations are involved in the foregoing actions, they cannot be said to be illegal.[10] They do, however, tend to introduce discord in international relations even though their purpose may be simply to enhance some internal program, the effect on the other state being at most an incidental factor in plans of the acting state. If a state considers itself sufficiently abused by such conduct, it may retaliate by some measure equally within its prerogatives. Such responses are retorsions. Although retorsions need not be in kind, there are examples of retorsions strikingly similar to the provocation, such as the Act of 18 April 1818.[11]

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[10] BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 745 (2d ed. 1962) takes note of the effect of possible treaty limitations upon the availability of retorsion.

[11] Ch. 70, §§ 1 & 2, 3 Stat. 432, which provided that ports of the United States would be closed to vessels owned wholly or in part by a subject of Britain coming from any port or place in a colony or territory of Britain which was closed against vessels owned by citizens of the United States and also that British-owned vessels leaving United States ports would have to post bond against delivery of cargoes to ports closed to United States vessels. Another example is the Act of 3 Oct. 1913, 19 U.S.C. §§ 130 & 131 (1964): "No goods . . . unless in cases provided for by treaty, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country [of origin of the goods]. . . ." An exception is made for vessels of countries which do not have similar bans which would affect United States vessels.

B. *STATUS OF RETORSION IN COMTEMPORARY INTERNATIONAL LAW*

As retorsion is by no means a friendly method of international relations, certain provisions of the United Nations Charter must be considered in determining the availability of retorsion in modern times. Amongst the purposes of the United Nations stated in article 1 of the Charter, we find:

> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

It is probably premature to assume that those provisions ipso facto preclude resort to retorsion. However, in particular circumstances, they may be relied upon to support a contention that an act done in the classic context of retorsion is a threat to the peace sufficient to call for injunctive action by the United Nations.

III. REPRISALS

A. *GENERAL CONDITIONS*

> Reprisals are such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.[12]

There are three conditions which reprisal must meet in order to be legitimate: (1) It must be in response to a breach of public international law which transgresses the interests of the responding state. (2) Prior to recourse to reprisal, a reasonable attempt must be made to obtain redress from the offending state through peaceful means. (3) Reprisal must not be excessive; the action must be proportionate to the offense.[13]

Breach of public international law may be found either in a

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[12] II OPPENHEIM 136.

[13] These are the conditions set forth by the Portuguese-German Arbitral Tribunal, in the Naulilaa Incident Arbitration, 1928; 2 U.N. Rep. Int'l Arb. Awards 1012. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 747 (2d ed. 1962); BRIGGS, THE LAW OF NATIONS 951 (2d ed. 1952); and 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 154 (1943), also report the facts and decision of this case. II OPPENHEIM 142–43 makes the additional point that reprisals must cease when reparation is assured.

departure from the obligations of customary law or in a breach of treaty. In either case, it is a matter of state responsibility. This means that reprisals are not justified simply because the nationals of one state mistreat the nationals of another or even defile the prestige of the state itself, such as by stoning an embassy. The state responsibility for such cases would arise only in one of three ways. If the state instigated the wrongdoing, then its responsibility is plain. If the acts were strictly the products of individuals without direction or encouragement from the state, then state responsibility arises only if before the event the state failed to take adequate precautions in light of circumstances to prevent the wrongdoing, or after the event it failed to take reasonable measures to apprehend and prosecute the wrongdoers. In the latter case, the international delinquency is not the original wrongdoing, but the failure of the state to take appropriate subsequent action.[14]

The second condition for legitimate reprisal needs little elaboration. Orderly international relations would be a futile hope if obligations could be disregarded at the least provocation without first resorting to diplomatic discussion of problems with a view toward amicable solutions. Here, though, circumstances may alter the evaluation of what is reasonable.

The condition of proportionality must be recognized as containing a large element of subjectivity. International law does not require a precise measure of injury for injury. It may be considered quite proportional to respond with somewhat greater force. It is suggested that,

> . . . a State would not be justified in arresting, by way of reprisal, thousands of foreign subjects living on its territory because their home State had denied justice to one of its subjects living abroad. But it would be justified in ordering its own courts to deny justice to all subjects of that foreign State . . . .[15]

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[14] FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 22 (1938), sets out a "Survey of Elements Necessary to produce International Responsibility.—Conventional doctrine posits a minimum number of elements as essential to the establishment of responsibility. These may be summed up as follows: (1) an act or omission in violation of international law, (or, put somewhat differently, conduct on the part of a State contrary to that required of it by a given international obligation); (2) The unlawful act, as a general rule, must be *imputable* to the legal person of the State; that is to say, the conduct in question must be attributed to those organs or agents of the States which are qualified by municipal law to accomplish 'State acts'; (3) resultant damage to the claimant State, either directly, in the person of its nationals, or both." (Emphasis in original; footnote omitted.)

[15] II OPPENHEIM 141.

Situations discussed under the various subheadings for specific forms of reprisal will point up the difficulty of assessing proportionality.

There is another limitation on reprisals which must be considered apart from the three conditions discussed above. In the employment of reprisals, care must be taken to avoid injury to states or nationals of states not party to the original delinquency. It has even been said "[reprisals] must not be employed where injury to other States or the nationals of third States *may* result." [16] But that position is extreme and does not comport with state practice. Although reason dictates that reprisal injuries be limited to the delinquent states, incidental injury to others does not subject the reprisal action to condemnation. This was evident in events consequential to the United States bombardment of Greytown, Nicaragua, in 1854. France at first made representations on behalf of her nationals who suffered losses there, but acquiesced in the United States position that those persons were not entitled to indemnity from the United States. The British Government declined to make any representations on behalf of its nationals.[17]

B. *CLASSIC FORMS OF REPRISAL*

1. *Boycott.*

As has been previously stated, there is no pre-existing requirement that one state do business with another. However, if in the course of international relations a state undertakes, by treaty or otherwise, the obligation to carry on trade with a particular state, then it may suspend such trade only by resort to reprisal which is termed boycott.[18] There is another form boycott may take

[16] STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 290 (2d ed. rev. (1959) (emphasis added).

[17] Perrin v. United States, 4 Ct. Cl. 543 (1868), discusses these factors in arriving at a decision denying the claim of a former French national for losses sustained in the bombardment.

[18] FENWICK, INTERNATIONAL LAW 535 (3d ed. rev. & enl. 1948) maintains, "So long as the boycott is a purely voluntary act on the part of citizens acting individually or in concert, it would appear that the measure falls outside the scope of international law. But if any element of governmental pressure . . . should enter into the boycott, there would be ground for protest by the foreign government." (Footnote omitted.) Hyde and Wehle, *The Boycott in Foreign Affairs*, 27 AM. J. INT'L L. 1 (1933), and Lauterpacht, *Boycott in International Relations*, 14 BRIT. YB. INT'L L. 125 (1933), give good analyses of the Chinese boycotts generated by guilds in the early 20th century against resented foreign enterprise. The question of state responsibility arose in these cases because of treaty obligations more favorable than a mere license to foreigners to do business and because of failure to subdue violence which attended some of the boycott measures.

which can be justified only as reprisal, even in the absence of treaty obligations. If two or more states act in concert to cut off the trade of a third state, this would be an international delinquency unless jutified as reprisal.

2. *Embargo.*

A form of reprisals frequently resorted to by states in the eighteenth and nineteenth centuries was to sequester vessels of the delinquent state which were found in the ports of the injured state. This was the classic form of embargo in international law.[19] But the seizure of vessels may also take place on the high seas. This has been part of the practice at least since the eighteenth century.[20] The object of the embargo is to obtain redress for the original wrong. To this end, the ships and their cargoes provide a sort of performance bond. If reparation is made, the ships are released.

There are other actions of international interest which have been called embargo. The Non-Intercourse Act[21] prohibiting commerce with France, England, and their colonies might more properly have been called a boycott but is commonly referred to as embargo. The practice of angary (seizing of neutral goods on the high seas subject to payment) is sometimes called embargo but is distinguished as a wartime measure. On occasion, a state has ordered its own ships to remain in its ports for reasons of national interest not related to international disputes.[22] And the Mutual Defense Assistance Control Act of 1951[23] by its terms places an "embargo" on strategic supplies to nations threatening the security of the United States—and provides that the United States will afford no military, economic, or financial assistance to any nation which does not apply a similar "embargo." It would seem that this provision fits the criteria of boycott.

The press at times[24] has referred to the 1965–66 action against Rhodesia as being embargo.[25] The economic sanctions in that case—including a ban on the shipment of oil to Rhodesia

[19] *See* FENWICK, *supra* note 18, at 534; II OPPENHEIM 141.

[20] COLOMBOS, INTERNATIONAL LAW OF THE SEA 422 (5th rev. ed. 1962).

[21] Act of 1 March 1809, ch. XXIV, 2 Stat. 528.

[22] As the British have done to bar export of coal during domestic shortages due to strikes. *See* II OPPENHEIM 142 & n.5.

[23] Ch. 575, 65 Stat. 645 (1951).

[24] *E.g.*, The Daily Progress (Charlottesville, Va.), 7 Sept. 1966, at 1, cols. 1–2, at 20, cols. 4–5; N.Y. Times, 6 April 1966, at 16, cols. 3–6; N.Y. Times, 2 April 1966, at 9, cols. 5–6.

[25] Other aspects of the Rhodesian affair are discussed subsequently.

and a refusal to buy Rhodesian tobacco—do not constitute embargo in the classic sense, since there are no Rhodesian flag vessels being detained by anyone. So, we see that the term "embargo" is applied to a variety of actions other than the classic international reprisal.

3. *Bombardment.*

Reference has already been made to this form of reprisal.[26] The Greytown incident is one instance when it was employed. Prior to 13 July 1854, this community of Nicaragua "had become the resort of desperate and reckless adventurers, who took pleasure in despoiling the citizens of the United States and insulting her flag and authority."[27] Despite demands of the United States upon the Nicaragua government, no satisfactory control was established in the town. When the demanded apology was not made for rudeness and indignity visited upon an accredited menister of the United States who was traveling there, the United States Navy made good the warning that Greytown would be bombarded. Here, one might wonder at the application of the proportionality test. After the naval gunfire ceased, a landing party went ashore and burned what remained of the town. This seems a rather rigorous penalty for the delinquency of Nicaragua, but the incident is generally accepted as a legitimate reprisal.

In 1923, under the Covenant of the League of Nations, intensive consideration was given the question of whether or not bombardment could be a legitimate reprisal. In August of that year Italian members of a border dispute commission, charged with setting the frontier between Greece and Albania, were assassinated in Greece. When Greece would not fully comply with Italian demands in response to this incident, an Italian ship bombarded the Greek island of Corfu and landed an expeditionary force there to occupy the island, announcing that no act of war was intended and that the occupation was temporary.[28]

The Council of the League of Nations called upon the Conference of Ambassadors in Paris to settle the issue. This was done in favor of Italy without apparent reference to any new restrictions on use of force which the Covenant may have imposed. Later, five legal questions raised by the incident were referred to

[26] See note 17 *supra* and accompanying text.

[27] Perrin v. United States, 4 Ct. Cl. 543, 546 (1868).

[28] BRIGGS, THE LAW OF NATIONS 960–64 (2d ed. 1952), gives a detailed account of the incident, subsequent discussions in the Council of the League of Nations, and pertinent portions of the report of the Commission of Jurists appointed to answer questions raised by the incident.

a Special Committee of Jurists.[29] The Special Commission was rather obtuse in its answer to the question of critical importance here.

QUESTIONS.

. . . .

IV. Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 and 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedures laid down in those articles?

. . . .

ANSWERS.

. . . .

IV. Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[30]

Although the Special Commission did not set forth any helpful criteria for solving the question, its Report was occasion for publicists to offer their opinions on the matter against the use of force.[31] And subsequently the League, in certain instances, espoused this view.[32]

Today, the United Nations Charter would seem to preclude the lawful use of force such as bombardment in the absence of the requirements of self-defense.[33]

4. *Pacific Blockade.*

During the nineteenth and twentieth centuries, a practice of blockade—distinguished from the belligerent blockade—devel-

[29] Wright, *Opinion of Commission of Jurists on Janina–Corfu Affair*, 18 AM. J. INT'L L. 536 (1924), is gratified that at least after the settlement of the controversy the various legal contentions raised were submitted "to a commission of jurists as abstract questions."

[30] 5 LEAGUE OF NATIONS OFF. J. 524 (1924).

[31] De Visscher, *L'Interpretation du Pacte au lendemain du differend Italo-Grec*, 5 REV. DROIT INT'L 213–30, 377–96 (1924), suggested that all armed reprisals were contrary to the spirit of the Covenant, and beyond that, contrary to article 12 because they were likely "to lead to a rupture." Guani, *Les Mesures de Coercition Entre Membres de la Societes des Nations*, 31 REV. GEN. DROIT INT'L PUB. 285 (1924), takes a similar view. *See* BRIGGS, *supra* note 28, at 962.

[32] *E.g.*, Greco-Bulgar dispute of 1925, Paraguay-Bolivia dispute of 1932, Sino-Japanese dispute of 1932, and Finnish-Soviet dispute of 1939. *See* BRIGGS, *supra* note 28, 963–64.

[33] The Security Council took a specific incident for a rather broadbrush condemnation of reprisals:

oped. Whereas the belligerent blockade conducted in wartime closed access to an enemy port or sea coast against all vessels of whatever flag,[34] the classic pacific blockade was instituted primarily against vessels of the blockaded state. Pacific blockade has not been restricted to reprisal for its justification. When it is employed to further a political purpose and is not in response to a violation of international law, it is labeled an intervention.[35]

In many instances, the only vessels affected have been those of the blockaded state. There seems to be no authority for seizing vessels of other states; but there is some contention by writers that, in spite of this, third states must respect the blockade. However, this view is not generally held.[36]

In most cases, pacific blockades have been carried out against small powers by great powers. In circumstances where third states of great power status did not suffer interference, settlements were reached in a manner which gave status of legality to the blockade whether vessels of other third states were affected or not.[37] But, when Germany, Great Britain, and Italy instituted a blockade against Venezuela to collect a debt and planned to enforce the blockade against all shipping, the United States announced it would not admit of any "extension of the doctrine of pacific block-

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"*The Security Council*

"*Having considered* the complaint of the Yemen Arab Republic regarding the British air attack on Yemeni territory on 28 March 1964 [S/5635],

"*Deeply concerned* at the serious situation prevailing in the area,

"*Recalling* Article 2, paragraphs 3 and 4, of the Charter of the United Nations,

"*Having heard* the statements made in the Security Council on this matter,

"1. *Condemns* reprisals as incompatible with the purposes and principles of the United Nations;

"2. *Deplores* the British military action at Harib on 28 March 1964;

"3. *Deplores* all attacks and incidents which have occurred in the area;

"4. *Calls upon* the Yemen Arab Republic and the United Kingdom of Great Britain and Northern Ireland to exercise the maximum restraint in order to avoid further incidents and to restore peace in the area;

"5. *Requests* the Secretary General to use his good offices to try to settle outstanding issues, in agreement with the two parties." 19 U.N. SCOR, Supp. April–June 1964, at 9, U.N. Doc. S/5650 (brackets and italics in original). Though this "condemnation" can hardly be discounted as irrelevant, neither can it be said to be dispositive of the question of whether or not reprisals may still be available as a legal sanction. It is still "what States do out of a sense of what is right" that determines international law. States are not likely to abstain from self-help in the absence of collective security.

[34] *See* COLOMBOS, INTERNATIONAL LAW OF THE SEA 672 (5th rev. ed. 1962).

[35] *See* FENWICK, INTERNATIONAL LAW 535–36 (3d ed. rev. & enl. 1948).

[36] *See* II OPPENHEIM 147.

[37] *See* FENWICK, INTERNATIONAL LAW 536 (3d ed. rev. & enl. 1948).

ade which may adversely affect the rights of states not parties to the controversy. . . ."[38] Britain, Germany, and Italy then declared it a belligerent blockade in order to firmly establish their authority.[39] The United States had similarly objected to interference with shipping imposed by a blockade of Crete in 1897[40] and a blockade of Greece in 1916.[41]

> The United States has never had recourse to pacific blockade. Its chief interest in the employment thereof by other States has been confined to the question whether such action was or should be designed to apply to the ships and commerce of a third power.[42]

In 1962, when the Cuban missile incident gave the United States occasion to employ methods akin to pacific blockade, its long-known position was influential in some degree in labeling its action a "quarantine" rather than blockade. One of the principle interests of the United States was:

> . . . a strict quarantine of all offensive military equipment under shipment to Cuba. . . . All ships of any kind bound for Cuba *from whatever nation or port* will, if found to contain cargoes of offensive weapons, *be turned back*. . . .[43]

It was then clear that the United States was not inclined to limit its attention to vessels of states "party to the controversy," and certainly not to Cuban ships. Apparently, also, the purpose was to turn back ships rather than to seize and sequester. So, there were two variations on the classic pacific blockade, the first being a substantial departure from the United States position on pacific blockade.

There have always been two factors vital to the success of a pacific blockade. The first is a natural concomitant of the general conditions on reprisal: Notice of intent must be made in advance of action in order to preclude outbreak of general hostilities between the adversaries. Secondly, the state upon which the block-

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[38] Telegram from the Secretary of State to the Ambassador in Germany, [1903] FOREIGN REL. U.S. 420 (1904).

[39] *See* VI MOORE, INTERNATIONAL LAW DIGEST 586–92 (1906). The United States acquiesced in the "war" and belligerent rights incident thereto, so long as the European powers were not intent upon acquiring territory contrary to our Monroe Doctrine.

[40] *See* note from Secretary of State to the Ambassador from Great Britain, [1897] FOREIGN REL. U.S. 255 (1898).

[41] *See* note from the Secretary of State to the Ambassador from France, [1916 Supp.] FOREIGN REL. U.S. 105 (1929).

[42] 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1668 (2d rev. ed. 1951).

[43] Address by President Kennedy, delivered from the White House by television and radio, 22 Oct. 1962, in 47 DEP'T STATE BULL. 715, 716 (1962) (emphasis added).

ade is imposed must be incapable of or unwilling to resist by means of general armed conflict. The specter of nuclear devastation no doubt influenced the Soviets to comply with the "quarantine" in spite of its powerful navy.[44] But, even in those circumstances where compliance was most prudent for the time being, protest in the United Nations Assembly or at other forums could be expected if the quarantine were seriously considered contrary to law. No such serious protest was lodged against the quarantine.[45]

The usefulness of pacific blockade as an instrument of national policy has been explored and said to offer these advantages:

1. Pressure can be applied on actual or potential aggressors away from territorial boundaries by warships of the blockading states.

2. Economic restrictions are effected without directly involving the native populace in conflict.

3. Military units can be maintained in nonsovereign waters.

4. International decisions may gravitate toward areas less combatant in nature than war.

5. The alternate avenues of arbitration, mediation, and conciliation can be thoroughly explored before war becomes inevitable.[46]

C. *STATUS OF REPRISAL IN CONTEMPORARY INTERNATIONAL LAW*

1. *Use by Individual States.*

The provisions of the United Nations Charter against the use or threat of force [47] and, indeed, a number of other treaties in force adopted since World War I,[48] would seem to have written

[44] ". . . [Pacific blockade] is naturally a measure which will scarcely be made use of in the case of a difference between two powerful naval states . . . ." II OPPENHEIM 149.

[45] "The United States declaration on October 22, 1962, of a 'quarantine' of Cuba to prevent importation of 'offensive missiles' and to induce withdrawal from Cuba of those already there was put into effect with Naval forces on Oct. 24, 1962, and was protested in the Security Council on that day by Cuba as 'an act of war' and by the Soviet Union as a 'threat of war' in violation of the Charter." Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 547–48 (1963) (footnote omitted). But the protests were pro forma and gathered no concensus. *See* 9 U.N. REV. (No. 11) 1 (Nov. 1962).

[46] Thomas, *Pacific Blockade: A Lost Opportunity of the 1930's?*, 19 NAV. WAR COLL. REV. (No. 3) 36, 38–39 (Nov. 1966).

[47] *See* note 5 *supra*.

[48] *E.g.*, General Treaty for the Renunciation of War, 27 Aug. 1928, art. II, 46 Stat. 2343 (1929–31), T.S. 796, provides that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be . . . shall never be sought except by pacific means." Rio de Janeiro Anti-War Treaty of Nonaggression and Conciliation, 10 Oct. 1933, 49 Stat. 3363 (1935–36), T.S. 906, contains a similar provision. The Inter-American

out of the prerogatives available to individual states those reprisals which employ force. But, realism requires that, since specific means of settling disputes by judicial or arbitral systems have not been made obligatory, and since settlement through the United Nations under the circumstances of today's world will, at best, be an occasional event, resort to reprisals, such as boycott or any treaty suspension not requiring use of force, must be left open to states.

In the absence of effective United Nations enforcement action, we cannot expect states to be content with only the nonforceful reprisals if they do not produce satisfactory results. So long as there is no central legal force monopoly in the world community, states may be expected to protect their interests in the manner they deem called for by the situation. The best we can hope for is an interpretation of international law to call for an "exhaustion of remedies" before the threat or application of force, and an application measured by the conditions on reprisal set forth in the Naulilaa Arbitration."[49]

2. *Reprisal and Action Conducted Under Auspices of the United Nations Charter.*

Reprisal may be termed a method of securing compliance with international law. The United Nations Organization has been designed with the intent that it be the principal agent for securing compliance with international law. Articles 41 and 42 of the Charter contemplate means of action against a "threat to the peace, breach of the peace, or act of aggression" which have been the means "traditionally employed as reprisals." [50] It is con-

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Treaty of Reciprocal Assistance (2 Sept. 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838) is even more restrictive in articles I and II which provide, in essence, that the parties undertake to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controveries, and to have recourse at all times to pacific procedures.

[49] But the publicists tend to give full effect to the Charter prohibitions. "The prohibition of paragraph 4 [see note 5 *supra* for text thereof] is absolute except with regard to the use of force in fulfillment of the obligations to give effect to the Charter or in pursuance of action in self-defence consistently with the provisions of Article 51 . . . ." II OPPENHEIM 154 (footnote omitted). STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 285–88 (2d ed. rev. 1959), presents the same view.

[50] II OPPENHEIM 162, 163 & n.1., where it is also pointed out that "application of these measures [under articles 41 and 42] does not depend upon a previous violation of International Law." The point here is that compulsive action by the Security Council may result from a "threat to the peace . . . [by] an attitude of unneighbourliness and lack of accommodation inimical to the maintenance of international peace and security (though not necessarily inconsistent with International Law). . . ." However, the present writer

venient to examine action under the auspices of the United Nations in four categories.

The first category is action, as provided under chapter VII of the Charter, in accordance with recommendations or decisions of the Security Council. Articles 41 and 42 of this chapter contain the only specific references in the Charter to actions comparable to reprisal, and these articles put resort to these actions in the province of the Security Council.

The ineffectiveness of the Security Council in matters which would be under the purview of chapter VII results from the requirement of article 27 for concurrence of all permanent members in *decisions* of the Security Council on such matters.[51] The veto and expectation of veto have rendered chapter VII of the Charter less than reliable.[52] It is probable that the prospective permanent members, in drafting the Charter, anticipated this result, but each was loathe to admit in advance—and in abstract—of legal enforcement under the Charter against itself or another state with which it might be in sympathy.[53]

The second category is action in accordance with General Assembly recommendations under chapter VI as limited by articles 10, 11, and 12.[54] Primarily, the United Nations Organiza-

submits that, where a "threat to the peace" is determined, there is a violation of the Charter, therefore (many will say) a violation of international law, despite the intrinsic nature of the conduct originating the threat.

[51] *See* U.N. Charter art. 27, which provides: "1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

[52] See STONE, *supra* note 49, at 228–37, for a perceptive analysis of the Korean situation, concluding that even initially it was *not* a Security Council enforcement action obligatory upon members because of the noncurrence (through abstention) of U.S.S.R., but a collective measure by members of the United Nations authorized by Security Council *recommendation* which does not require concurrence of all permanent members.

[53] II OPPENHEIM 174 expresses this view.

[54] Art. 10: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Art. 11: "1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulations of armaments, and may make recommendations with regard to such principles to the Members

tion is concerned with the establishment and maintenance of peace. Chapter VI is titled "Pacific Settlement of Disputes," and the General Assembly has become active in this endeavor pursuant to its "Uniting for Peace" Resolution of 3 November 1950.[55] This actually consists of three resolutions. The controversial one —pursuant to which the General Assembly takes direct measures (by way of recommendations to members) to settle disputes—provides, *inter alia*, for establishment of a Peace Observation Commission to observe and report on the situation in any area where international tension threatens international peace and security, for maintenance by member States of elements of their national armed forces for prompt use as United Nations units, and for a Collective Measures Committee to recommend methods for maintaining and strengthening international peace and security.

The Resolution was disputed as a usurpation of Security Council primacy and the principle of permanent member unanimity—in effect, an amendment of the Charter by improper means.[56] In fact, the Resolution—and, by its terms, its Preamble—are cognizant of the *primary responsibility* of the Security Council for maintenance of peace and security. It is also cognizant, however, of the underlying obligation of the members and the responsibility of the United Nations as a whole for maintenance of

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or to the Security Council or both. 2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such questions on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion. 3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. 4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10."

Art. 12: "1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. 2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters."

[55] Text appears in 9 U.N. BULL. 508 (1950).

[56] 3 U.N. REV. (No. 6) 16–18 (Dec. 1956) contains this information.

peace and security; and it is further cognizant of the notable lack of effectiveness on the part of the Security Council in carrying out its primary responsibility in this regard."

Moreover, the peacekeeping "forces" operating under the auspices of the General Assembly and the Resolution have not presumed to have the authority which would inure with a force directed by the Security Council. In each case, these peacekeeping forces have been considered to need permission from a host government in order to enter a country. As a result of this compunction and the low key approach desired, the United Nations Expeditionary Force did not enter Israel in conjunction with the Gaza Strip controversey.[36]

Except for this compunction—which leads these peacekeeping forces to seek entry permission before acting—their conduct might be analogized to the historic practice of show of force made by maintaining "a naval squadron in or near the waters of a foreign State charged with wrongdoing. Such means have been employed by the United States in dealing with disordered countries. . . ."[37] It is noteworthy that, even with the consensus supporting a peacekeeping force, more restraint is exercised and more consideration is given to sovereignty than was the case when spheres of influence were more limited and better defined.[38]

There has been, then, a "shift in the peace protecting functions of the United Nations from policing to 'rheostatic activity.' By

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[35] STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 268–78 (1959), interprets the arguments for and against the legality of the "Unity for Peace" Resolution under U.N. Charter articles 10 and 11. He concludes, at 277 n.51, in concurrence with McDougal and Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 288–91 (1951), that the Resolution is legal, but in "terms of what the Charter tolerates rather than what it authorizes."

[36] *See* RUSSELL, UNITED NATIONS EXPERIENCE WITH MILITARY FORCES: POLITICAL AND LEGAL ASPECTS 67–71 (1964).

[37] 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1659 (2d rev. ed. 1951). Hyde classifies this conduct as an act of retorsion. He notes, "The classification of the several non-amicable measures which States employ for purpose of obtaining redress may be unimportant. Publicists are not agreed in the matter, while statesmen are unconcerned."

[38] Klaus Knorr, in his *Foreward* to BURNS AND HEATHCOTE, PEACEKEEPING BY U. N. FORCES (1963), states, "Mankind would stand an excellent chance of suffering unprecedented destruction if the traditional organization of military power on a strictly national basis, and the traditionally weak impediments to the use of military power, were continued in the nuclear age . . . . [N]ations everywhere have an incentive to help contain and speedily extinguish brushfires, no matter how small or remote and to organize themselves for this purpose. . . ."

this is meant that the dominant peace preservation function of the United Nations has emerged as one of 'intensity reduction' and not of investigation, adjudication, and enforcement. . . ."[61]

This brings us to the third category of action under the auspices of the United Nations Charter, that provided by chapter VIII, Regional Arrangements.[62] Prior to the drafting of the Charter, the Conference of American Republics had approved the Act of Chapultepec,[63] which recommended a treaty to establish a regional arrangement contemplating the "use of armed force to prevent or repel aggression." With this in mind, chapter VIII was made part of the Charter.

The Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Pact),[64] which followed the Act of Chapultepec recommendation was reffirmed in the Charter of the Organization of American States (O.A.S.) adopted at Bogota in 1948.[65] This is the chief regional arrangement which has been relied upon in

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[61] Alford, *The Cuban Quarantine of 1962: An Inquiry into Paradox and Persuasion*, 4 VA. J. INT'L L. 35, 67–68 (1964).

[62] Art. 52: "1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agancies before referring them to the Security Council. 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council. 4. This Article in no way impairs the application of Articles 34 and 35."

Art. 53: "1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such times as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further agression by such a state. 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter."

Art. 54: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."

[63] 12 DEP'T STATE BULL. 339 (1945).

[64] 2 Sept. 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838.

[65] 30 April 1948, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361.

terms of justification for action taken by its members."[66] The Cuban missile crisis of 1962 provides a good fact situation for analyzing this justification and has prompted considerable discussion by publicists regarding chapter VIII of the Charter as well as other questions of international law raised by the incident.

Abram Chayes, Legal Adviser to the Department of State, explained in an address[67] to the 10th reunion of the Harvard Law School Class of 1952 at Boston, Massachusetts, on 3 November 1962, that the Cuban quarantine was imposed under article 6 of the Rio Pact[68] against a "threat to the peace other than armed attack." Chayes pointedly denied that article 51 of the United Nations Charter was the basis for this quarantine.[69] Leonard Meeker, the Deputy Legal Adviser for State, also avoided reliance on article 51 and pointed to the Rio Pact and article 52(1) of the United Nations Charter as authority for the quarantine.[70]

The Department of State position, as reflected by Chayes, is that "[s]elf-defense . . . is not the only justifiable use of force under the charter. Obviously, the United Nations itself could sanction the use of force to deal with a threat to the peace. . . ."[71] He contends that, through the original assent of the members constituting the regional arrangement and the political processes required to reach a decision to use force in a particular situation, the O.A.S. may deal with a threat to the peace in the hemisphere in much the same way as the United Nations may act globally.[72]

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[66] Although frequent reference is currently made to SEATO (Southeast Asia Collective Defense Treaty, 8 Sept. 1954, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170) to explain the United States presence in South Vietnam, the strength of this explanation is in answering the questions of domestic law of the United States rather than the broader question of international law.

[67] 47 DEP'T STATE BULL. 763, 764–65 (1962).

[68] Art. 6: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

[69] *See* 47 DEP'T STATE BULL. 763, 764 (1962). *See also* Chayes, *Law and the Quarantine of Cuba*, 41 FOR. AFF. 554 (1962–63).

[70] *See* Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963).

[71] 47 DEP'T STATE BULL. 763, 764–65 (1962).

[72] *Id.* Whether or not this quarantine was truly an O.A.S. measure adopted by the free judgment of its members has been questioned. *See* Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 588 (1963). A brief resume of

Meeker meets the question posed by the second sentence of article 53(1): "But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ." His analysis is remarkable: The Security Council has only primary responsibility, not total responsibility, for the maintenance of peace and security. "Authorization" does not mean *prior* authorization, nor does it mean express authorization. Acquiescence will do. "Enforcement action" is a term of art in the context of the United Nations Charter. This term should be applied only to "such measures [as] are orders of the Council with which Member States are bound to comply. . . . Thus, 'enforcement action,' as the phrase appears in Article 53(1), should not be taken to comprehend action of a

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events preceding the quarantine may be useful. The Foreign Ministers of the Western Hemisphere agreed in the Declaration of San Jose in August 1960 to condemn outside intervention in the affairs of this hemisphere. (*See* 43 DEP'T STATE BULL. 395 (1960).) In January 1962 in Punta del Este, the Foreign Ministers unanimously resolved to exclude the Castro Government of Cuba from participation in the Inter-American system because of its Communist subversive activities, and to impose economic restrictions on that Government. (*See* 46 DEP'T STATE BULL. 267 (1962).) During 2 and 3 October 1962, the twenty American Republics (excluding Cuba) were represented informally in Washington. The text of their final communique indicated "the most urgent . . . [problem] is the Sino-Soviet intervention in Cuba as an attempt to convert the island into an armed base for Communist penetration of the Americas and subversion of the democratic institutions of the Hemisphere. . . . The meeting . . . affirmed the will to strengthen the security of the Hemisphere against all aggression from within or outside the Hemisphere and against all developments or situations capable of threatening the peace and security of the Hemisphere through the application of the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro." (*See* 47 DEP'T STATE BULL. 598, 599 (1962).) With that background and upon clear indication of clandestine introduction by the U.S.S.R. of offensive missiles to Cuba, President Kennedy must have felt confident of O.A.S. support when, on 22 October 1962, he announced over radio and television that he had directed a strict quarantine on all offensive military equipment under shipment to Cuba. (*See* 47 DEP'T STATE BULL. 715 (1962).) On 23 October the Provisional Organ of Consultation of the American States resolved that the members take measures in accordance with articles 6 and 8 of the Rio Pact to meet this threat to the peace. (*See* 47 DEP'T STATE BULL. 720 (1962).) Thereupon, the United States Proclamation (No. 3504, 3 C.F.R. 232 (1959–63 Comp.)) was signed announcing the quarantine would go into effect at 2:00 p.m. Greenwich time the 24th of October. Meantime, on 22 October Ambassador Stevenson informed the President of the Security Council of the Soviet threat to peace and on 23 October he read the O.A.S. Resolution to the Security Council. *See* Christol and Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962*, 57 AM. J. INT'L L. 525, 527–28 (1963).

regional organization which is only recommendatory to the members of the organization."[73]

> The quarantine was based on a collective judgment and recommendation of the American Republics made under the Rio Treaty. It was considered not to contravene Article 2, paragraph 4, because it was a measure adopted by a regional organization in conformity with the provisions of Chapter VIII of the Charter. The purposes of the Organization and its activities were considered to be consistent with the purposes and principles of the United Nations as provided in Article 52. This being the case, the quarantine would no more violate Article 2, paragraph 4 than measures voted by the Council under Chapter VII, by the General Assembly under Articles 10 and 11, or taken by United Nations Members in conformity with Article 51.
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> Finally, in relation to the Charter limitation on threat or use of force, it should be noted that the quarantine itself was a carefully limited measure proportionate to the threat and designed solely to prevent any further build-up of strategic missile bases in Cuba.[74]

The State Department, by arriving at this construction of the United Nations Charter which gave the Regional Organization authority to conduct the quarantine, deemed it unnecessary to construe article 51 in relation to the missile crisis.[75] There is merit in seeking justification other than self-defense, since the imminence of danger from the missile launchers not yet assembled makes the necessity of action in the context of self-defense highly debatable.

Since the United States portrays itself in the quarantine as a primary agent of the O.A.S. and justifies the quarantine as O.A.S. action, this theory of the case has been challenged:

> It is urged that this article [52(1)] gives to the regional organizations the right to use force collectively for the removal of threats to the peace in their region in a situation where an individual state would not have the right to use force.
>
> This position seems to be of doubtful validity. Certainly the wording of Article 52(1) . . . gives it no support. Nor do the debates at the San Francisco Conference and the discussion there of the Act of Chapultepec support the suggested construction, for that act specifically provided only for the collective use of force "to prevent or repel aggression."[76]

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[73] Meeker, *supra* note 70, at 519–22. With regard to the issue of authorization, Meeker contends that in the view of the United States it was not necessary, but for the sake of argument, considers since the "Council let the quarantine continue rather than supplant it," the consent is implied. *See id.* at 522.

[74] *Id.* at 523–24.

[75] Other publicists were attracted to that exercise, however.

[76] Seligman, *The Legality of U.S. Quarantine Action Under the United Nations Charter*, 49 A.B.A.J. 142, 144 (1963). (Mr. Seligman finds the quarantine legal on other grounds.)

This appraisal of article 52(1) overlooks the obvious reference therein to the "Purposes and Principles of the United Nations," which include in article 1: "to take *effective collective* measures for *prevention* and removal of threats to the peace. . . ." (Emphasis added.) What may be "appropriate for regional action" is certainly dependent upon the effectiveness to be expected from other sources of action such as the Security Council.

It has been suggested that perhaps the right of a state to protect itself does not depend exclusively on the doctrine of self-defense, but may be found also in the "common duty to maintain international peace and security (as an affirmative responsibility of states) provided for in both Chapter I of the United Nations Charter and in the 1947 Inter-American Treaty of Reciprocal Assistance."[77]

Since Soviet Russia was a principal actor in the drama of the Cuban missile crisis, it has been considered necessary to query whether regional arrangements under chapter VIII are competent to handle such external threats or are limited to matters strictly internal to the region. The above reference to *effective collective* measures for *prevention* and removal of threats to the peace and "appropriate regional action" would seem to answer this query. But the eminent Professor Quincy Wright doubts that the Soviet shipment of missiles to Cuba was a threat to the peace or otherwise in violation of international law.[78] According to Wright:

> [I]t is clear that neither the Monroe Doctrine nor Inter-American treaties can impose obligations of international law on the Soviet Union, though politically they may constitute a warning to non-American countries of attitudes likely to be taken by American countries.[79]

And:

> The [O. A. S.] resolution could not . . . in law affect the rights of the Soviet Union, against which the quarantine was primarily directed.[80]

> It is difficult to find that the Soviet Union violated any obligations of international law in shipping missiles to, and installing them in,

[77] Christol and Davis, *supra* note 72, at 537 (footnotes omitted).

[78] *See* Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

[79] *Id.* at 552. Wright quotes Ambassador Stevenson: "The principle of the territorial integrity of the Western Hemisphere has been woven into the history, the life, and the thought of all the people of the Americas. In striking at that principle the Soviet Union is striking at the strongest and most enduring strain in the policy of the hemisphere." *Id.* n.28. Wright relates: "The value of the Monroe Doctrine depended in large measure on the natural defense of the Americas by oceanic distances and has greatly declined with the development of jet planes and intercontinental missiles." *Id.*

[80] *Id.* at 558.

> Cuba, at the request of the Castro government. Under general international law, states are free to engage in trade in any articles whatever in time of peace.[81]

Wright allows that "[i] t is possible that Castro hoped to use the presence of missiles as a threat to expand his influence among the Caribbean republics. It can also be argued that Castro violated obligations under inter-American agreements and resolutions by his close relations with Communist Powers. . . ."[82] But this "threat to expand his influence" on the part of Castro is evidently not equated by Professor Wright to "threat to the peace," as denounced by the U.N. Charter. "Furthermore, [Castro] may well have considered that the deterrent influence of medium-range missiles, threatening American cities, was the only feasible defense against the overwhelming naval, military, air, and missile power which the United States was capable of launching against Cuba."[83]

Professor Wright seems to be giving us two alternative analyses of the situation. Either the Soviet Union and Cuba were engaged in a normal transaction in which they need not have brooked any interference, or they were cooperating in the defense of Cuba. "No satisfactory evidence has been presented to indicate that Khrushchev's purpose in sending the missiles was other than to deter attack on Cuba, and his willingness to withdraw them when the United States made the conditional pledge not to invade Cuba would support this defensive intent on his part."[84]

Far from being justified by the Rio Pact and the Organization of American States, the quarantine, according to one writer, was a violation of the Bogota Charter.

> The charter contains no provision for suspension or exclusion of a member state from the right of membership . . . .
>
> . . . .
>
> In considering the legality of the Cuban quarantine, students of international law must first determine whether Cuba could be deprived of its rights under the charter to be immune from intervention in her internal or external affairs . . . particularly when the exclusion may have been in violation of the charter. Had Cuba not been excluded from membership in the O. A. S., she could have pleaded her immunity from quarantine under Articles 15 and 16 of the Bogota Charter. Exclusion of Cuba, it would seem therefore, could have been possible only after an amendment of the charter.[85]

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[81] *Id.* at 548–49 (footnotes omitted).
[82] *Id* at 553 (footnote omitted).
[83] *Id.* at 550.
[84] *Id.* at 553.
[85] Standard, *The United States Quarantine of Cuba and the Rule of Law*, 49 A.B.A.J. 744, 746 (1963).

Professor Wright, without explicitly referring to Cuba's rights under the Bogota Charter, has indicated that Cuba had a legitimate right to import the missiles and the interference posed by the quarantine was unwarranted in international law. In this respect, both Professor Wright and Mr. Standard overlook important operative facts of the case. Can they realistically maintain that the Soviet Union proposed to supply these missiles and technicians to be deployed and employed at the discretion of Castro (presumably in the "self-defense" of Cuba, as that phrase is traditionally used)? "The objectives of the Soviet Union in moving major military power into the Western Hemisphere were clearly expansionist. . . . The reference by Professor Wright to the shipping and installation of missiles as 'trade' between the Soviet Union and Cuba in 'time of peace' would appear at least mildly euphemistic."[86]

It is apparent, then, from the standpoint of the United States and the Organization of American States, the Cuban missile crisis of 1962 represented an international wrong in the form of a threat to the peace by the Soviet Union with the cooperation of Cuba. The reaction was reminiscent of reprisal, in the form of temporary, proportionate interruption of the freedom of the seas for the perpetrators of the wrong until the threat of the missiles was removed.

The fourth category of action under the auspices of the United Nations is a peculiar one in many respects. In our present context no label has been attached to it, perhaps because the situation is unique and no label comes readily to mind.

When Rhodesia declared its indepdendence on 11 November 1965,[87] this unique situation was triggered. Prior to this unilateral declaration against the authority of the United Kingdom of Great Britain and Northern Ireland, there had been expressed in the United Nations General Assembly concern about "the repeated threats of the present authorities in Southern Rhodesia immediately to declare unilaterally the independence of Southern Rhodesia, in order to perpetuate minority rule in Southern Rhodesia." [88] When the declaration came on 11 November, the Gen-

[86] McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 601–02 (1963).

[87] N.Y. Times, 12 Nov. 1965, at 16, col. 5.

[88] G.A. Res. 2012, 20 U.N. GAOR Supp. 14, at 53, U.N. Doc. A/6041 (1965). Another resolution, adopted 8 November 1965 (G.A. Res. 2022, 20 U.N. GAOR Supp. 14, at 54, U.N. Doc. A/6041/Add. 1 (1965)), *inter alia* noted that increasing cooperation between the authorities of Southern Rhodesia, South Africa, and Portugal, "is designed to perpetuate racist minority rule in southern Africa and constitutes a threat to freedom, peace and security in Africa."

eral Assembly reacted with a resolution on 12 November condemning the declaration, "inviting" Great Britain to take measures in accord with previous resolutions to "put an end to rebellion," and recommending that the Security Council "consider this situation as a matter of urgency." [89] The Security Council on the same day condemned the declaration and called "upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime." [90] In a second resolution on the 20th of November, the Security Council condemned the "usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity. . . . Calls upon the Government of the United Kingdom to quell this rebellion of the racist minority. . . ." [91]

The uniqueness of the situation is apparent in many aspects. First, it is unlikely that any claim to statehood has previously met with such a concentration of condemnation and denial of recognition.[92] Secondly, the reason for the denial of recognition does not address itself to the objective criteria of statehood set out in Oppenheim, but is concerned with Rhodesia's publicly expressed policies of internal administration, a matter only recently taken within the cognizance of international law.[93] Thirdly, although states are free to not recognize a claim to statehood, affirmative action to contravene such claims have normally been left to the discretion of the states whose interests (usually territory in a case such as Rhodesia) have been impinged by the claim. Fourthly, and most germane to our context, the situation is unique in the annals of the United Nations, in the General Assembly and Security Council designating Great Britain as a single agent to stamp out this "threat to peace."

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[89] G.A. Res. 2024, 20 U.N. GAOR Supp. 14, at 55, U.N. Doc. A/6041/Add. 2 (1965).

[90] S.C. Res. 216, 20 U.N. SCOR Supp. Oct.–Dec. 1965, at U.N. Doc. S/ (1965).

[91] S.C. Res. 217, 20 U.N. SCOR Supp. Oct–Dec. 1965, at U.N. Doc. S/ (1965).

[92] I OPPENHEIM'S INTERNATIONAL LAW 118 (8th ed. Lauterpacht 1960) [hereafter cited as I OPPENHEIM] sets forth the criteria of statehood as being a people living together as a community settled in a country with a government of persons who rule according to the law of the land independent of any other earthly authority. At 127, he says that existing states by recognition or nonrecognition perform a quasi-judicial function in declaring whether in their opinion a claimant to statehood fulfills the condtions of statehood as required by international law.

[93] For example, by such measures as the Universal Declaration of Human Rights (G.A. Res. 217, 3 U.N. GAOR, Res. I, at 71, U.N. Doc A/810 (1948)

The fact that Rhodesia is denied statehood might seem to make it awkward to apply a lexicon which developed in international relations. However, the sanctions which have been applied against Rhodesia have the backing of the world community with few exceptions; and, since Rhodesia has no better support in world opinion, those opposed to her claim of statehood can employ sanctions and terminology without fear that Rhodesia will thereby gain the backwash benefit of recognition which use of those sanctions historically may have brought.

The measures taken against Rhodesia have been economic in nature. Initial steps by Britain were to expel her from the sterling area, suspend her preferential tariff treatment, ban purchase of her principal crops (tobacco and sugar), ban export of United Kingdom capital, and refuse to honor passports issued by Rhodesia.[94] Although Great Britain was "invited" by United Nations Resolutions to "take measures" to "put an end to the rebellion," Great Britain did not act alone. Other countries were quick to cooperate.[95] Another sanction employed by Great Britain is the stopping of oil shipments to Rhodesia. In this, she has the cooperation of all but Portuguese Mozanbique and the Union of South Africa.[96]

Britain has been very cautious in its handling of the Rhodesian situation. Although Britain has sought the assistance of the United Nations at various junctures, she emphasizes that "since Rhodesia is legally a colony, it is technically a British rather than an international problem."[97] The fact that the United Nations has taken official cognizance of the situation and urges its members to maintain a policy of attrition toward Rhodesia indicates that the United Nations considers it very much an international problem. The eleven east and central African nations are convinced it is an international problem, and one of utmost concern to them. They have urged Britain to use force to bring the rebel to heel.[98] Zambia has announced a plan to disengage itself from the British Commonwealth, because of disappointment over British action and its failure to gain the capitulation of Rhodesia.[99]

[94] Speech by Prime Minister Harold Wilson in the House of Commons, 11 Nov. 1965, excerpts in N.Y. Times, 12 Nov. 1965, § 1, at 17, col. 2.

[95] The United States suspended Rhodesia's sugar quota for 1965 and 1966. *See* US/UN press release 4711, 53 DEP'T STATE BULL. 915 (1965).

[96] British naval forces off Madagascar, with the approval of that government, divert oil tankers bound for Portuguese Mozambique to discharge oil for Rhodesia. Greece, by royal decree, prohibits the transport of oil to Rhodesia by Greek flag vessels. *See* N.Y. Times, 2 April 1966, at 9, col. 5.

[97] Washington Post, 8 April 1966, at A1, col. 8, at A11, col. 1.

[98] N.Y. Times, 3 April 1966, at 7, col. 8.

[99] Washington Post, 24 July 1966, at A23, col. 1.

The United Nations Organization itself, though concerned about the "threat to peace" posed by a white minority government in a negroid populace in the middle of Africa, is acting somewhat in the manner of a novice forest ranger coming upon an abandoned campfire in the middle of a dry woods. He knows the fire should be put out to make certain the wood is not endangered, but he is afraid the means he has available may scatter hot embers. So, he decides to stand and watch the fire and hope for the best.

Whether the British action and general world cooperation will succeed in abating the "threat to the peace" posed by Rhodesia is a question which cannot be answered now. But with that answer lies the answer to another question: Will the United Nations again resort to the single state agent to apply sanctions in a "peacekeeping" operation? Perhaps, because the Rhodesian situation is so peculiar to itself, the solution (if one there be) cannot be adapted to another situation. The history of international relations does not support this notion, however. If indeed the Rhodesian situation can be resolved without bringing on an uncontrolled conflagration, the lessons learned will certainly be filed for ready reference.

IV. INTERVENTION

A. *GENERAL*

Having now examined some of the historical actions short of war for which states have been able to find more or less distinguishing labels, we come to a label which has eluded satisfactory definition.

"Intervention" is a word which has been used in describing forms of international relations since the time of Grotius. Today, it is a word used with great frequency. It is an unfortunate word, because it can be so readily applied to such a wide range of activities so dissimilar in purpose and method. It is a word often used to generate world opinion against the conduct of an adversary.[100]

[100] The following quote is indicative of the complexity of the term "intervention":

"The term 'intervention' is widely used in international law and foreign relations. Despite its wide usage, it is most difficult to define its true meaning. The term is used for various situations and for various purposes by individual writers. Further confusing the problem, is the use by the same writer of the term to include situations which do not fall within his carefully delineated boundaries. Strauz-Hupe and Possony say, 'intervention is a term with many legal meanings.' Students of international law have utilized that meaning of the term they found convenient to accomplish their predetermined view of the legality of a particular situation with which they

> *Intervention* is a word which is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence.[101] [Italics in original.]

It will be seen that, if observers agree that certain action by a state is intervention, this is no assurance that these same observers agree that the action is legal or illegal. "Intervention," in simplest terms, is an exercise of influence on the affairs of another state. The very existence of international relations implies exercise of influence by one state on the affairs of other states. In passing, it might be well to note Talleyrand's definition of "nonintervention": "A Mysterious word that signifies roughly the same thing as intervention." [102]

> It should be clear that prohibitions on intervention are part of the quest for an ideal seen as the equal sovereignty and independence of nations . . . Complete independence is, and has been, a slogan concealing an illusory goal; if, indeed, it was ever otherwise, today the inter-

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were concerned. Varying uses of the term prove Fenwick correct when he says that 'of all the terms in general use in international law, none is more challenging than that of 'intervention.'

"To some authorities, the term intervention means the interference of a third state into a conflict between two other powers, to include the use of armed force or the offer of good offices. They would have included the participation of the United States in World Wars I and II as examples of intervention. In fact, in Volume II of Oppenheim he would include such a situation in his definition of intervention whereas in Volume I of the same work he would limit intervention to an interference in the affairs of only one other state. In the latter definition, Oppenheim says that the term consists 'in the dictatorial interference in the affairs of another state.' Hall, on the other hand, (also quoted by Moore) defines intervention to include interference in the 'domestic affairs of another state *irrespective* of the will of the latter' which inclusion would indicate that the act of intervention might take place with the consent of the second state. Graber, Lawrence, and the Thomases find essential to the understanding of the term, the inclusion of the threat of force by the intervening state." Douglass, *Counterinsurgency: A Permitted Intervention?*, 25 MIL. L. REV. 43, 46–47 (1964) (footnotes omitted; italics in original).

[101] BRIERLY, THE LAW OF NATIONS 402 (6th ed. Waldock 1963). I OPPENHEIM 305 states: "Intervention is dictatorial interference by a State in the affairs of another State for the Purpose of maintaining or altering the actual condition of things."

[102] Modelski, The International Relations of Internal War, 24 May 1961 (Research Monograph No. 11, Woodrow Wilson School of Public and International Affairs, Center of International Studies, Princeton University), makes this comment (at 9) in quoting Talleyrand: "Subversion, foreign aid, and mediation are the three modes of foreign policy reaction to internal war. Let me stress that there is no fourth alternative, no way for the 'second' country to avoid involvement in internal war. Even though a country may decide not to act at all, to do nothing and to say nothing, then by this very fact it, too, helps—sometimes unwittingly—to mold the outcome of the process: for by refusing to act, it helps the stronger party to suppress the weaker, irrespective of the merits of the case. This is the meaning of Talleyrand's celebrated definition of non-intervention . . . ."

dependence of all nations is a commonplace refutation of any notions of independence.[103]

It is evident that some exercise of influence is a normal coincidence of our international community; still other exercise of influence is conducted as a welcome incidence of international cooperation. Again, the exercise of influence may be illegal or depend on special circumstances for justification. In order to fairly assess these various exercises of influence and the opinions of scholars in relation to them, the term "intervention" must be stripped of such distasteful connotation as it carries.

B. CATEGORIES OF INTERVENTION

1. *Intervention as a Coincidence of the International Community.*

The above discussion of retorsion is apropos to intervention as a coincidence of the international community. So, too, is the above mention of municipal embargoes. It can readily be seen that, if one state is overpopulated and attempts a program of emigration to alleviate the problem, and another state (otherwise a likely destination for the emigrants) closes its borders against immigrants from that state, it might be said that the action of the second state intervened in the problem of the first state. But, barring a treaty obligation, the action of the second state cannot be said to be illegal.

In another example, if the mines in one state are the sole or principal source of coal for a second state, and the first state bars export of coal due to domestic shortages, this action might be said to be intervention in the affairs of the second state. But, barring a treaty obligation, the action cannot be said to be illegal.[104]

These are examples of state action, motivated by domestic interest and unregulated by international law, which coincidentally exercised an influence on the affairs of another state. The state which is adversely affected by the "intervention" may generate sentiment for it and against the "intervenor," but this sentiment would not amount to a judgment on the legality of the action in question.

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[103] Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 AM. SOC. INT'L L. PROC. 148, 156 (1963).

[104] [E]ven though . . . [these measures] may starve [another country] to death . . . ." Friedmann, *Intervention, Civil War and the Role of International Law*, 59 AM. SOC. INT'L L. PROC. 67, 69 (1965).

This "coincidence of international relations" is here framed in a manner which depicts the "intervention" as harmful to the passive state. Perhaps a more fertile field for weighing the pros and cons of "intervention" by the norms of international law can be found in the matter of international cooperation.

2. *"Benefaction" as Intervention.*[105]

It is often the case, particularly in the twentieth century, that a government of a particular state will request the assistance of another state on any number of matters. The "cold war" has fostered a greater interest on the part of the United States in rendering assistance on a global scale.

The Soviet bloc charged the United States with intervening in the internal affairs of Greece and Turkey by our foreign aid program to those countries.[106] This program was simply one of the earlier postwar efforts of the United States to aid nations in repelling the threat of subversion by international communism.[107] The European Recovery Program—popularly known as the Marshall Plan—was an enormous undertaking with the same purpose. Western Europe, devastated by the war, was feared in jeopardy of succumbing to the fate of the Eastern European nations. Our enabling statute—The Economic Cooperation Act of 1948[108]—carried the explanatory phrase: "An Act to promote world peace and the general welfare, national interest, and foreign policy of the United States. . . .

Secretary of State Marshall cast light upon what that "national interest and foreign policy" was:

> We have stated in many ways that American aid will not be used to interfere with the sovereign rights of these nations and their own responsibility to work out their own salvation. I cannot emphasize too much my profound conviction that the aid we furnish must not be tied to conditions which would, in effect, destroy the whole moral justification for our cooperative assistance toward European partnership.[109]

Though it was expressly denied that interference with the sovereignty of these nations was part of American policy, it cannot be denied that the European Recovery Program, financed by the

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[105] The phrase is adapted from Michael Cardozo's *Intervention: Benefaction as Justification*, in ESSAYS ON INTERVENTION 63 (Stanger ed. 1964).

[106] *See* 2 U.N. SCOR 616–25, 698–718 (1947).

[107] *See* President Truman's Message to Congress, 12 March 1947, in 1947–48 DOCS. ON INT. AFFAIRS 2 (1952).

[108] Ch. 169, 62 Stat. 137.

[109] *Hearings on European Recovery Program Before the Senate Comm. on Foreign Relations*, 80th Cong., 2d Sess., pt. 1, at 6 (1948), as quoted in BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 735–54 (2d ed. 1962).

United States, had an enormous affect on the internal affairs (and ultimately external affairs) of the Western European nations. If the Program had been administered totally without United States controls, it still would have fit several contemporary definitions of "intervention." [110]

The United States is embarked on numerous programs designed to bring the people of various countries a better life more quickly than their governments could do alone. Our government and the recipient governments consider these programs essential for a stable development of these nations. International cooperation is a rational approach to achieving the shared goals of these governments and ours.[111]

The term "government" is used deliberately here to point up the problem which arises because of the state of flux we find in the international concept of "sovereignty." Gone are the days when sovereignty rested with the head of state—the monarch. Today "self-determination of peoples" is a principle of international law which is expressed very eloquently.[112] It cannot be denied that social awareness has diverted much of the thrust of international law away from the protection of some ethereal "state sovereignty" personified by the established government and toward a recognition of, and interest, in the "rights of man."

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[110] Cardozo, *supra* note 105, carefully analyzes the conditions placed upon the recipients of Marshall Plan aid. He divides the conditions into two categories: "those aimed at making sure that the program would succeed in achieving European recovery and those aimed at protecting and promoting the interests of the United States and its economy . . . .Was the United States, in providing the funds for this program, a benefactor helping other nations, or a great power helping its own interests?" (*Id.* at 75.) He concludes that "conditions that are calculated to further the common aims of a mutually agreed program . . . can be looked upon as voluntarily accepted. Then the supervision and pressure that have as their purpose the achievement of those common aims are permissible forms of intervention. Conditions outside this category, however, if they are seriously enforced, stand on weaker ground. Sometimes it will be easy to distinguish between the two kinds of conditions, but in many cases the distinction will be in dispute. When this occurs, there are likely to be charges of . . . impermissible intervention." (*Id.* at 81.) Cardozo's solution is to channel aid through international organizations to filter out the taint of intervention.

[111] Examples of treaties related to programs of this nature are: General Agreement with Ecuador for Economic, Technical and Related Assistance, 17 April 1962, [1962] 1 U.S.T. 425, T.I.A.S. 5003; Agreement with Brazil on the Cooperation for the Promotion of Economic and Social Development in the Brazilian Northeast, 13 April 1962, [1962] 1 U.S.T. 356, T.I.A.S. 4990. (The Brazilian treaty by its terms reflects an urgent need to relieve unrest amongst the people of the Northeast.)

[112] U.N. Charter art. 1, para. 2.

These aid programs which the United States is conducting are not neo-colonialism or imperialism by any means. Latin America is today one of the areas where the United States is conducting or participating in extensive programs designed to bring the people a better life. Latin America has a most consistent history of resenting and protesting against any interference in the internal affairs of the various states.[113] But Latin America as a whole does not resent the idea of these programs.

However, throughout history there have been dissident peoples —those not satisfied with their government. Today, the people of the world are more aware of events beyond their door and beyond even the borders of their countries. In many cases their circumstances suffer by comparison with what they learn about the world beyond their immediate surroundings. They seek a better life, and in many cases their governments are not improving conditions fast enough to satisfy them. This brings about instability, which may lead to riots or revolution. If this happens, two different sorts of intervention may occur. The first sort would be to protect the lives and property of aliens, particularly the nationals of the intervenor. The second sort would be an effort to instigate or influence the outcome of the revolution.

3. *Intervention for Protection of Lives and Property of Foreign Nationals.*

> By a universally recognised customary rule of International Law every State holds a right of protection over its citizens abroad . . . .
>
> [A]n alien . . . must be afforded protection for his person and property . . . . [A]nd it is no excuse that . . . [the host State] does not provide any protection whatever for its own subjects . . . .[114]

"The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit." [115]

The United States intervention in the revolution in the Dominican Republic in April 1965 was initiated to protect and evacuate

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[113] The Convention on Rights and Duties of States, 26 Dec. 1934, 49 Stat. 3097 (1935–36), T.S. No. 881; and the Convention on Rights and Duties of States, 20 Feb. 1928, 46 Stat. 2749 (1929–31), T.S. No. 814, both show the Inter-American attitude against intervention has long antedated even the expression of that attitude found in the Inter-American Treaty of Reciprocal Assistance, 2 Sept. 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838, and the Charter of the Organization of American States, 30 April 1948, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361.

[114] I OPPENHEIM 686–88.

[115] *Id.* at 309 (footnote omitted).

the United States citizens there.[116] When violence erupted in the Dominican Republic on 24 April 1965, and continued through the 26th, the police were special targets and suffered heavy casualties. Police were unable to provide protection and maintain order.[117] The American Embassy negotiated promises of safe conduct for evacuees from the Hotel Embajador, where they assembled to go to the port of Jaina seven miles away. During the 27th and 28th, the evacuations were carried out under the hazard of sniper fire despite the safe conduct promises from rebels and anti-rebels.[118]

It was only on 28 April, when the road to Jaina became too hazardous for travel, that a detachment of 500 U.S. Marines were landed to establish a perimeter at the Hotel Embajador so that evacuation could continue by helicopter. Some of those 500 Marines were also used to reinforce the guard at the U.S. Embassy and Chancery, which were being subjected to heavy sniper fire.[119]

These Marines were sent in because disorder and hazard to lives were the prevailing factors in Santo Domingo. At that time, there was no duly constituted government in the Dominican Republic, and no faction was able to enforce order.

> [T]he military officials then exercising such authority as there was in the Dominican Republic informed us that the safety of foreign nationals could not be guaranteed any longer and that an immediate dispatch of forces was necessary to safeguard their lives. United States forces were sent only after that request, and we promptly notified both the OAS and the United Nations.[120]

The United States action in meeting this crisis clearly complies with the conditions for the lawful exercise of the right of intervention to protect nationals:

(*a*) an imminent threat of injury to the nationals;

(*b*) a failure or inability on the part of the territorial sovereign to protect them;

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[116] *See* speech by Under Secretary of State Mann to the Inter-American Press Association, 12 October 1965, in 53 DEP'T STATE BULL. 730, 733 (1965). The other developments in the Dominican Republic crisis, including U.N. Security Council notice and O.A.S. participation, will be discussed *infra*.

[117] *See id.* at 733.

[118] *See id.* at 734.

[119] *Id.*

[120] Statement by U.S. Representative Adlai E. Stevenson in the U.N. Security Council on 19 May 1965, in 52 DEP'T STATE BULL. 913, 915 (1965).

(c) that the measures of protection should be strictly confined to the object of protecting them against injury.[121]

However, it has been contended that the right of intervention for this purpose may have been rendered illegal because, amongst other instruments, the "United Nations Charter, Article 2, paragraph 4, together with the exceptions provided in Articles 39 and 51, prohibits this and other forms of intervention."[122]

This contention of illegality by a noted scholar is just the sort of blind obeisance to irrational idealism which detracts from the usefulness of international law and influences the naive to look upon international law as an exercise in futility. Certain idealism is necessary in the practice of international law if progress is to be made in bringing order to international relations. Certainly an active idealism is necessary if the world is ever to achieve a lasting peace. But idealism is prostituted if it ignores fundamental human values and urges compliance with an interpretation of law which in application destroys those values.[123] It is true that international law is a discipline conceived to bring order to international relations. It is also true that "sovereignty" is a cherished concept in international law. But it is also true that "humanity" has come to have at least enough dignity in the arena of international affairs to be protected, even at the expense of cherished, though abstract, "sovereignty." This is especially so in situations such as the chaos which prevailed in the Dominican Republic in late April 1965.

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[121] Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Hague *Recueil* 451, 467 (1952 II), as construed by BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 299 (1963).

[122] BROWNLIE, *supra* note 121, at 298 (footnote omitted). Presumably the other "instruments" to which Brownlie refers are treaties such as the Conventions on the Rights and Duties of States and the Charter of the Organization of American States, *supra* note 113.

[123] Leonard C. Meeker, Legal Adviser for the Department of State, has espoused a "practical idealism." Although the present writer hesitates to give wholehearted endorsement to the following passage, it is acknowledged as triggering the thoughts expressed in the accompanying text: "It does not seem to me that law and other human institutions should be treated as abstract imperatives which must be followed for the sake of obeisance to some supernatural power or for the sake of some supposed symmetry that is enjoined upon the human race by external forces. Rather, it seems to me that law and other institutions of society should be seen as deliberate and hopefully rational efforts to order the lives of human communities—from small to great—in such a way as to permit realization by all members of a community of the full range of whatever creative powers they may possess." Meeker, Address before the Foreign Law Association at New York, 9 June 1965, in 53 DEP'T STATE BULL. 60 (1965).

The Dominican crisis of 1965, of course, had ramifications other than the question of right of intervention to protect nationals. At least one other form of intervention was in question in that case, and that form of intervention cannot be justified by resort to an ideology which mouths phrases such as "human values." To do so would be to distort the language at best, and to attempt to superimpose the intervening state's ideology on the rest of the world at worst.

4. *Intervention to Instigate or Influence Outcome of a Revolution.*

Intervention to instigate or influence the outcome of a revolution is probably the most critical form of intervention in the modern world. There are a number of political factors which have brought consideration of intervention in the internal affairs of a nation to a central position on the stage of world affairs. *One* of these factors is the development of the law regarding aggression. *Secondly*, the trend of international morality toward elimination of the colonial power of western Europe and the consequent establishment of new states in the international community have created a wealth of targets for a new form of influence. *Thirdly*, the ideological struggle now engaged in by at least three factions of the world community, led by the United States, Soviet Russia, and Red China, is finding a battleground amongst these newly formed states and other underdeveloped states. A *fourth* factor is the awesome capability of modern weaponry held by the great powers, which makes direct military conflict between them so mutually dangerous as to almost preclude its occurrence. These factors tend to direct the main efforts of the great powers to expanding one sphere of influence in these new states at the expense of the other great powers.[134]

"There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of being at peace with the legitimate Government." [135] Perhaps this is one of the oldest acknowledged rules of international law, reflecting as it does, the cherished attributes of sovereignty—supreme within, independent without. The noted British international lawyer, Hall, has stated: "Supposing the intervention to be di-

[134] Friedmann, *Intervention, Civil War and the Role of International Law*, 59 AM. SOC. INT'L L. PROC. 67, 70–71 (1965), lends direct support to the second and third factors discussed above and by implication supports the first and fourth by pointing out the versatility of intervention as a tool of expansion of influence.

[135] II OPPENHEIM 660.

rected against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way." [126]

On the other hand, "supreme within, independent without" refers to the sovereignty of the *state*, not the government which is merely the agent of the sovereign state for the time being. "Self-determination of peoples" has long been an ideal promoted by those influential in the development of international law.[127] The principle of self-determination is now ensconced in article 1, paragraph 2, of the United Nations Charter.

Of course, it is not anticipated that existence of rebellion in a state will demand of other states that they cease forthwith their international relations with the government against which the rebels are fighting. But the extent of assistance which may be legally afforded that government is hardly a settled question. The quandry is perhaps best demonstrated by Hall in the remainder of the passage partially quoted above:

> Supposing [the intervention] on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.[128]

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[126] HALL, A TREATISE ON INTERNATIONAL LAW 347 (8th ed. Higgins 1924).

[127] The Declaration of Independence states that a government derives its power to govern from the consent of the people. Thomas Jefferson, then Secretary of State, in his message to Morris, the United States Minister to France, on 7 Nov. 1792, concerning the recognition of the new government of France achieved by bloody revolution, said: "It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared." And, in another letter on 12 March 1793, added: "We surely can not deny to any nation that right whereon our own Government is founded—that every one may govern itself according to whatever form it pleases, and change these forms at its own will . . . . The will of the nation is the only thing essential to be regarded." (I MOORE, DIGEST OF INTERNATIONAL LAW 120 (1906).)

[128] HALL, *supra* note 126. On the other hand, there is authority for the proposition that "[u]nder customary international law foreign states can give aid to a parent state . . . ." (Evidently without reference to whether or not the insurgents are supported by outside intervention.) Powers, *Insurgency and the Law of Nations*, 16 JAG J. 55, 62 (May 1962) (citing Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66, 73 (1937)). Admiral Powers contends that this support of the loyalist government against insurgents does not threaten "the territorial integrity or political independence of any state" protected by article 2 of the United Nations Charter. In the absence of foreign support for the insurgents, this view is questionable when taken in light of the principle of "self-determination of peoples."

How is "assistance" in this context to be distinguished from what have come to be seen as relatively routine instances of international cooperation? Newly organized states, with their newly inaugurated governments are dedicated to "catching up" with the techniques of the longer-established members of the international community. These "techniques" are found in industrial, agricultural, and, inevitably, military organization. The longer-established members of the international community, particularly the protagonists in the search for fields of influence, provide technical advice and equipment in these areas of interest. In the event of a grass-roots rebellion against the government receiving this assistance, is continuation of this assistance a violation of international law? Does it make a difference if the assistance is in the form of active, vigorous, on-scene advice, as that provided by the U.S. military advisors in the Republic of Vietnam in the late 1950's and early 1960's? [130] Unfortunately, for whose who would like to see issues and answers neatly filed in airtight compartments, there are no definitive answers to those questions.[130]

Revolution is acknowledged in international law to be as legitimate a means of self-determination as any other.[131] The United States would be the last to deny this. But foreign instigation and support of rebellion is no more "self-determination" than is outright conquest. International communism has seized upon the phrase "self-determination" and distorted it into a useful propaganda tool. International communism has found its fertile ground to sow its seeds of rebellion amongst the discontented people whose governments have not, as yet, been prepared to meet their awakening desires for a better life. International communism has reaped a remarkable harvest with the use of artful propaganda such as this expression of Premier Khrushchev:

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[130] The present writer does, by no means, intend to imply that the guerrilla warfare in the Republic of Vietnam at the time in question, or presently, could be described as a purely grass-roots rebellion.

[130] Admiral Powers, *supra* note 128, at 63, points out, "Where an uprising has passed into a state of insurgency or rebellion so that it constitutes a threat to the established government, and is supported by a large segment of the citizens of the country, the principle of non-intervention [as contained in article 15 of the Organization of American States Charter] becomes paramount." This "principle of non-intervention" is peculiar to the Western Hemisphere. But even so, the criteria for applying the principle are not altogether clear. What "constitutes a threat to the established government supported by a 'large segment' of the citizens"?

[131] *See* Wright, *United States intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 121 (1959).

> There will be liberation wars as long as imperialism exists, as long as colonialism exists. Wars of this kind are revolutionary wars. Such wars are not only admissible, but inevitable, for the colonialists do not freely bestow independence on the peoples . . . .
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> . . . .
>
> . . . What is the Marxist attitude to such uprisings? It is most favourable. These uprisings cannot be identified with wars between countries, with local wars, because the insurgent people fight for the right of self-determination, for their social and independent national development; these uprisings are directed against corrupt reactionary regimes, against the colonialists. The Communists support just wars of this kind whole-heartedly and without reservations, and march in the van of the peoples fighting for liberation.[132]

Of course this is a deception which endangers the very independence of the people who are the targets of this rabble rousing. Professor Neumann described very accurately the present state of things when he wrote:

> In the age of the international civil war it is not always necessary to move armies across national frontiers in order to win major battles. A central revolutionary authority, enforced by the new weapons of psychological warfare, can direct its orders by remote control through the well-established revolutionary pipelines of the disciplined party within the border.
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> . . . .
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> . . . [The hero or villian who suddenly determines the fate of a nation] is not the pattern of the twentieth century revolution. It is totalitarian and institutionalized, operating from a powerful mass basis and militantly organized to play its role in the international civil war.[133]

The law remains that "a foreign State commits an international delinquency by assisting insurgents in spite of being at 'peace' with the legitimate Government." [134] It follows that, in the event a foreign power is assisting insurgents in rebellion against the established government, that government is entitled to call upon other governments in sympathy with it to suppress the rebellion.

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[132] Address to General Meeting of Party Organizations of Higher Party School, Academy of Social Sciences, Institute of Marxian-Leninism of the Central Committees, Communist Party of the Soviet Union, 6 Jan. 1961, in 1 N. S. KRUSHCHOV, COMMUNISM—PEACE AND HAPPINESS FOR THE PEOPLES 12, 41–43 (1963).

[133] Neumann, *The International Civil War*, 1 WORLD POLITICS 333, 349 (1949).

[134] II OPPENHEIM 660. (Internal quotation marks added.)

It has been said that, despite repeated affirmation by the world community of the rule against "*indirect* as well as direct threats against the independence of a state" and a U.N. Assembly resolution condemning "intervention to change legally established governments," such illegal interventions "do not in themselves justify military intervention by another state to remedy them." [125] The reason given is that "[i]ntervention in the form of military reprisals to rectify wrongs when peaceful methods fails, while permissible by customary international law before World War I, have been forbidden by conventional obligations in the League Covenant and the Kellogg-Briand Pact, and particularly by the obligations of Members of the United Nations 'to settle their international disputes by peaceful means.' " [126]

In the next millenium perhaps we shall have utopia. "Obligations" do not ipso facto bring solutions. States may announce what the international law is on a certain point but it is quite another thing to have that "law" work. Until such time as states *find a way* to "settle their international disputes by peacefull means" it is unrealistic to expect one state or another to stand by and be abused while it waits for the "law" to come crashing down on its malefactor. This is not to say that states (scholars for that matter) should not strive to find ways to ease the tensions of the international community and ultimately achieve a lasting peace. That, after all, is the purpose of law in any community, and international law has made strides in that direction. But, in the final analysis people are the actors in the international community. All that can be expected of people, if history provides any lessons, is that human temperament will improve a little from time to time.

Today, with regard to intervention to instigate or influence the outcome of internal rebellion, what we can expect is that the conscientious will assess the facts of a situation, so far

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[125] Wright, *supra* note 131, at 115 (emphasis in original).

[126] *Id.* (footnote omitted). The use of the term "reprisals" by Professor Wright is unfortunate. Reprisal has historically been a remedy available only to the state which has suffered a wrong. It has never been considered a recourse available to a third state. Furthermore, the present writer is of the opinion that so far as the established government in the case posed by Professor Wright's proposition is concerned, the action of calling for help would simply be a means of self-defense. However, it is apparently the position of Professor Wright that an established government cannot rely upon the theory of "collective self-defense" and call for help against subversive intervention if internal dissidents in fact form part of the threat.

as the facts may be discernible, and apply the rules which have been firmly established in international law by the practice of states. This would mean that under no circumstances would the conscientious foment a rebellion in another state. Does this also mean that the conscientious would refrain from giving military assistance to the established government which is combatting a strictly internal rebellion? If we adopt the principle of "self-determination of people" without reservation, we must answer "yes". But international law does not require that an established government which is combatting an internal rebellion must cease and desist in its international relations. It in fact continues to be the responsible representative of the state in world affairs until such time as the rebels can effectively interfere with that representation. Military intervention on behalf of this government clearly should not take the form of organized forces in the field. But must the activities of Military Assistance Advisory Groups or Military Missions cease? So far there is little indication that such is the case.

C. *ANALYSES OF THE INTERVENTIONS IN THE REBELLIONS OF THE DOMINICAN REPUBLIC, 1965, AND VIETNAM, POST 1954*

The United States intervention to protect foreign nationals put in jeopardy by the rebellion in the Dominican Republic in April 1965, has been discussed. But there remains the question of United States presence and action in the Dominican Republic for several months after foreign nationals who wanted to be were presumably evacuated to safety.

The rebellion in the Dominican Republic, although not unique, was one of the rarer sorts. It certainly was not typical of what we have come to think of as the Latin American *coup d'etat.* Following the assassination of Trujillo in 1961, Juan Bosch had been elected President. But he was driven from office in September 1963, and on 24 April 1965, the ruling junta of Donald Reid Cabral was put to rout.[137] Pro-Bosch forces, though successful in forcing Cabral's resignation, were not able to gain control of the country. Anti-Bosch people formed a military committee to attempt to take charge. But the situation quickly deteriorated so that factions were not clearly iden-

[137] *See* address by Meeker, *supra* note 123.

tifiable and no faction had clear control of the country. There was, in effect, no government in the Dominican Republic.[138]

Up to this point there is nothing in the facts to indicate that this was anything more than a popular rebellion which got out of hand. The action of the United States in the Dominican Republic was deliberate and measured to accomplish the evacuation of foreign nationals, nothing more. But the United States appealed that the contending parties cease fire,[139] requested a meeting of the Council of the Organization of American States to consider the situation, and notified the Security Council of the United Nations of each of these moves.[140]

When the O.A.S. took cognizance of the situation, it called for all parties contending in the Dominican Republic to cease-fire and permit the immediate establishment of an international neutral zone in Santo Domingo in the area surrounding the embassies.[141] U.S. forces in the Dominican Republic manned the perimeter of this zone the same day.[142] None of these actions was inconsistent with respect due the political independence of the Dominican Republic. The U.S. forces were not "occupying" Dominican territory.[143] They were simply attempting to provide refuge while attempting to affect evacuation of thousands of foreigners caught in this disaster. The calls by the United States and the O.A.S. for a cease-fire were simply a form of offer of good offices to assist the contending Dominicans work out their problem and form a government without further bloodshed.

It was at this point that action of international communists, fomenting and taking advantage of the chaos, became apparent.[144] The United States has been criticized for justifying counterintervention "especially in the Dominican situation . . .

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[138] *See* television address by President Johnson, 2 May 1965, in 52 DEP'T STATE BULL. 744 (1965).

[139] *See* statement by President Johnson, 28 April 1965, in 52 DEP'T STATE BULL. 738 (1965).

[140] *See* letter from Adlai E. Stevenson to President of Security Council, 29 April 1965, in 52 DEP'T STATE BULL. 739 (1965).

[141] *See* Resolution of the Council of the Organization of American States, 30 April 1965, in 52 DEP'T STATE BULL. 741 (1965).

[142] *See* news release of Dep't of State read to news correspondents by Robert J. McCloskey, Director of the Office of News, 30 April 1965, 52 DEP'T STATE BULL. 742 (1965).

[143] That is, they were not exercising the prerogatives of a military occupier and subjecting the territory to military government.

[144] *See* radio-television statement by President Johnson, 2 May 1965, 52 DEP'T STATE BULL. 744, 745 (1965).

[because of] the involvement of Communists—even of a limited number—in an internal revolution. . . ." [145] This criticism points up the need for two related clarifications.

First, it should be made amply clear for those who stand ready to criticize that it is *international* communism which warrants counterintervention. Throughout the world, in various nations, there are, no doubt, political parties espousing ideologies similar to Marxist-Leninism except for their tenet which upholds a multi-party, national system. This is not the concern of any external sovereign including the United States. It is the international conspiracy of communism, exported by Soviet Ruissia and Red China, which concerns us.

Secondly, in a volatile situation, such as existed in the Dominican Republic in April–May of 1965, the *number* of personnel present and adhering to the international communist discipline is not the essential factor. The fact that there *were* personnel of this discipline present and taking advantage of the situation is the key. Within hours of the first rebel moves on 24 April, Castro-oriented communists (Fourteenth of June Political Group) in company with the Dominican Popular Socialist Party (a Moscow-directed group) had organized paramilitary teams, taken control of certain areas, and rallied support amongst the inhabitants.[146] The communist conference in Havana in November 1964 issued directives which appeared in *Pravda* on 18 January 1965, calling for active aid to "freedom fighters" in Latin American countries.[147] These elements took the initiative away from the Pro-Bosch rebels. The Pro-Bosch leaders of the rebellion took refuge in foreign embassies when they realized the rebellion was out of their hands and their positions usurped by the Communists.[148] It is a standard communist technique to use the masses to accomplish their purposes. They do not need armies of people schooled in their ideology and dedicated to it. A small cadre is enough to subjugate the masses and employ them to further the ends of the

[145] Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, 866–67 (1965).

[146] *See* statement by U. S. Representative Stevenson in the U.N. Security Council, 5 May 1965, in 52 DEP'T STATE BULL. 876, 881 (1965). Many of these persons were identified by name and political background during Ambassador Stevenson's statement (*see id.* at 882).

[147] *See* statement by U. S. Representative Stevenson in the U.N. Security Council, 3 May 1965, in 52 DEP'T STATE BULL. 869, 871 (1965).

[148] *Id.* at 873.

communist organization, given a situation such as existed in the Dominican Republic in April 1965 and the history of the Dominican for the past thirty years.

It has been said that the United States contravened articles 15 and 17 of the Charter of the Organization of American States by staying in the Dominican beyond what was necessary to evacuate foreign nationals.[149]

Article 15 provides:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

Article 17 provides:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

The terms of those provisions seem quite definite. It would be easy to agree with the critics. It would also be easy to say that the United States action was based simply upon a determination that it was necessary in the best interests of the United States and the Western Hemisphere regardless of any interpretation of "law". Perhaps that, in fact, was the basis of the action. But to say that does not mean that the action was contrary to law.

Remember that no organization was exercising effective government over any meaningful part of the Dominican during this time of crisis. How long does a piece of real estate containing people in a condition of chaos retain a residual claim to Statehood? ". . . [F]or any reason whatever . . ." has an awful ring of finality. But what entity had standing to complain? The target State had standing if there was a target "State". I suppose that international law scholars might quickly overcome my suggestion that the Dominican temporarily lost its claim to statehood. Conceding on that point, the next assault must be faced. This state, personified by a roiling mass of humanity, is heard to insist that it is entitled by article 15 of the Charter of the O.A.S. to continue unimpeded in its

[149] *See* Friedmann, *supra* note 145, at 867.

internal and external affairs. Granted that internal affairs include rebellions, can it be claimed that external affairs include being the target of subversion by international communism? Article 3(c) casts some light on this question: "To provide for common action on the part of those States in the event of aggression." Article 25 is also helpful:

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, . . . or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on that subject.

We must bear in mind that the political integrity of a state can only be protected if the *people* of that state are the true repositories of political integrity. The *people* must make a rational choice. This choice may be exercised by bullet or ballot, but if the choice is preempted in the heat of battle by usurpers of the rebellion, where is the political integrity?

Of course, the other members of the Organization of American States would have standing to complain. But the consensus of that group supported the stability operation proposed by the United States.[150] So no matter what may have been the previously held opinions of these States regarding the interpretation of articles 15 and 17, when the occasion came to test those interpretations in the Dominican situation, the O.A.S., as a body, felt no compunction against participating in the stability operation. Detractors will say that the "Behemoth of the North" gave the Organization no reasonable alternative. This overlooks the fact that in today's international political arena, with the contest of ideologies dominating the consciousness of all participators, if the United States were deemed wrong by this significant number of states, they would not hesitate to say so. It is what States do out of sense of what is right which makes international law.

It was made amply clear at all times that the O.A.S. stability operation which evolved from the initial action of the United

[150] *See* O.A.S. Resolution Establishing Inter-American Force, adopted in plenary session of 6 May 1965, by vote of 15–5 with one abstention, in 52 DEP'T STATE BULL. 862 (1965). But the O.A.S. had met and consulted and acted regarding the Dominican crisis before that. The resolution establishing a committee of five member states to offer good offices and attempt to obtain a re-establishment of peace and normal conditions was adopted 1 May by a vote of 19–0.

States was not a "military occupation" prohibited by article 17 of the O.A.S Charter.[151] No attempt was made by the U.S.—O.A.S. forces to set up a military government to administer the territory. Aside from holding down the shooting and attempting to clear the way for the people of the Dominican to set up a constitutional form of government of their own choosing,[152] the efforts of the O.A.S. were directed at humanitarian relief of the people by bringing in and distributing food and medical supplies on a non-discriminatory basis.[153] Far from interfering with the political integrity of the Dominican, the U.S.—O.A.S. action was designed to protect that integrity and provide a stability wherein the people of the state could exercise their self-determination in a rational manner.

Professor Friedmann states:

> Nor is it relevant, in the context of a legal appraisal, to point out that the United States occupation of Santo Domingo will be a temporary one, unlike, for example, the occupation of Tibet by China. The Legal Adviser's argument is one of policy, not of law, and it seeks to justify what is patently, by standards of international law, an illegal action, in terms of the ultimate policy objectives of the United States.[154]

It has already been pointed out that the presence of U.S. troops did not constitute an "occupation" as that term is used in international law. No United States spokesman has given any reason to state otherwise. Professor Friedmann calls it a "United States" occupation. The first entry of troops was on United States initiative as a humanitarian expedition. Professor Friedmann agrees that this did not violate international law.[155] The continuing stability operation for the purpose of permitting the people of the Dominican the opportunity to establish their own government by rational means was carried out under the auspices of the O.A.S. The United States may well have conducted such a stability operation in the absence of O.A.S. action, but that question is moot.

What are the standards of international law to which Pro-

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[151] *See* statement by U. S. Representative Ellsworth Bunker at the Tenth Meeting of the Consultation of Ministers of Foreign Affairs of the American Republics, 1 May 1965, in 52 DEP'T STATE BULL. 854, 855 (1965).

[152] *Id.*

[153] Resolution on Urgent Aid adopted unanimously in plenary session of 3 May 1965, in 52 DEP'T STATE BULL. 856 (1965).

[154] Friedmann, *supra* note 145, at 869.

[155] *See* id. at 867.

fessor Friedmann refers? In concentrating on articles 15 and 17 of the Charter of the O.A.S., he apparently chooses to give no credence to that part of article 25 which provides for action by the American States in the event that "political independence of any American State should be affected by . . . any other fact or situation that might endanger the peace of America. . . ." This is a restatement, in part, of the same principle embodied in article 6 of the Inter-American Treaty of Reciprocal Assitance (Rio Pact) of 1947.[156] The O.A.S., by the Resolution at Punta del Este 1962, seems to have equated the threat of the international conspiracy of communism to a fact or situation affecting the political independence of an American State and tending to endanger the peace of America.[157]

Perhaps it is contended that these treaties and this resolution are simply announcements of policy, and do not constitute, at least for the rest of the world, international law. The Dominican Republic was a party to those treaties and that resolution. As a party, she has extended an advance invitation to the other American States to counter any such threat which arises on her territory. Is it contended that those conspirators, whose interests would best have been served if no U.S.—O.A.S. action had been taken, were not parties? What of the international law of government succession? Not applicable? Then the Dominican was, indeed, a no-man's land and the powers of the Western Hemisphere were entitled to enter to protect their interests against the intended usurpers, by encouraging the inhabitants to set up a constitutional form of government.

In fact, the purpose and affect of the U.S.—O.A.S. stability operation was to allow the people of the Dominican the opportunity for rational exercise of political process in forming, out of chaos, a government of their choice. The political integrity of the Dominican people was preserved, not impinged.

2. *Vietnam.*

The Vietnam conflict and the participation of the United States on behalf of the Republic of Vietnam have attracted considerable attention. A great deal of the attention focuses on

[156] 2 Sept. 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838.

[157] Resolution adopted at the Eighth Meeting of Consultation of the Ministers of Foreign Affairs, 30–31 January 1962 (text at 46 DEP'T STATE BULL. 278 (1962)).

the discussion of the principle of self-defense.[158] The discussion of self-defense, even "collective self-defense" somehow tends to confuse the defense of the Republic of Vietnam with the defense of the United States. It is not the purpose of this present study to examine the usefulness, or even the need, of United States participation in Vietnam to protect the United States. However, it seems fair to say that at some point in time, perhaps in 1954, the United States had a choice regarding policy in Vietnam, and no matter how that choice would have been exercised, the United States would not have been in *immediate* danger.

For the reasons stated immediately above, the United States must be looked upon as an intervenor in the Vietnam conflict, not as a principal. The question, then, is whether or not the intervention is legal.[159] To answer this question, though, we must first assess some of the rights of the Republic of Vietnam, amongst them, her right of self-defense in this situation.

In assessing the rights of the Republic of Vietnam we must first determine her identity as an international entity in the world community. So far as is essential here, the Geneva Accords of 1954 were between Ho Chi Minh and France. The Republic of Vietnam was not a party to the Accords,[160] but might be considered a "third party beneficiary." Regardless of who may have been bound by the details of the Accords, they resulted in a line of demarcation dividing Vietnam into two territories, each administered by an independent government. The Accords, of course, did not designate the two administrations as independent governments. The immediate purpose of the Accords was to bring military action to a halt. The prospective purpose was to provide a means for the settlement of the political question of how the territory was to be governed.[161]

The Accords called for a general free election throughout the

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[158] *See, e.g.*, Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T STATE BULL. 474 (1966); Deutsch, *The Legality of the United States Position in Vietnam*, 52 A.B.A.J. 436 (1966), and numerous statements by United States spokesmen found throughout issues of the *Department of State Bulletin* for the past several years.

[159] Remember, we have purged the term "intervention" of any legal significance.

[160] *See* Comment, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 CALIF. L. REV 515, 520 (1962).

[161] The text of the Accords is reprinted in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 2D SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 66 (Comm. Print 1966).

whole of Vietnam in 1956 to settle the political question. The natural assumption might be that this provision contemplated a unified Vietnam as a result of the election. But this was not required. In fact, even in 1954 this must have seemed an unrealistic proposal. The communists led by Ho Chi Minh, who were to administer the North, were the antithesis of the vested interests in the South. How these two administrations could be expected to cooperate and coordinate a general free election is difficult to imagine.

Events overtook history, and, by 1956, there was no hope of uniting the whole of Vietnam by a general free election, because by that time at least, two states existed in Vietnam, one on either side of the 17th parallel, and each bitterly hostile toward the other. For all practical purposes, each state was treated as such by a large number of governments throughout the world.[163] By 1957, the United Nations General Assembly voted to recommend South Vietnam membership in the United Nations, but the Soviet Union, in the Security Council, vetoed the admission.[164] Both States are parties to the Geneva Conventions of 1949 for Protection of War Victims.[164]

Meantime, cadres adhering to the discipline of Ho Chi Minh (regardless of whether they were born north or south of the 17th parallel) set out immediately after the Accords to undermine the authority of the southern administration by organizing guerrilla forces and engaging in terrorist activities throughout the territory.[165] Ho Chi Minh had no illusions about winning the whole of Vietnam by free elections. He intended to obviate the need for any elections. In effect, even Ho Chi Minh was treating the South as a separate State (which he attempted, and is attempting, to annex by conquest).

Even though the Republic of (South) Vietnam has been established as a State separate from the Democratic Republic of

[163] "The Republic of Vietnam in the South has been recognized as a separate international entity by approximately 60 governments . . . ." Meeker, *supra* note 158, at 477.

[163] *Id.*

[164] The Republic of Vietnam gave notice of accession on 14 November 1953 to take effect on 14 May 1954. 181 U.N.T.S. 349–52 (1953). The Democratic Republic of Vietnam filed its notice of accession on 28 June 1957 to take effect on 28 December 1957. 274 U. N. T. S. 335, 337, 339, 341 (1957).

[165] DEP'T STATE, FAR EASTERN SERIES 110, A THREAT TO THE PEACE, NORTH VIETNAM'S EFFORT TO CONQUER SOUTH VIETNAM, pt. 1, at 7–10, 12–13, 50 (1961).

(North) Vietnam, it is not contended that the sole source of opposition to the government of that State is the communist North. South Vietnam has many of the problems common to newly emerging nations which contribute to the unrest of the populace discussed earlier. Therefore, even though the infiltration of men and supplies from the North to subvert the government of the South was a *known* factor in 1955 and 1956, it was difficult—if not impossible—to establish uncontrovertible proof sufficient to justify a full fledged military intervention on behalf of the government of the Republic of (South) Vietnam at that time.

Meantime, the United States was amongst those nations which established diplomatic relations with the Republic of (South) Vietnam. Incident to those diplomatic relations, we extended economic and technical cooperation and mutual security agreements. The Geneva Accords "prohibited the reinforcement of foreign military forces in Viet-Nam and the introduction of new military equipment. . . ."[166] Until 1961, the increase in United States Military Assistance Advisory Group personnel there brought the total to 900 and was only to offset the withdrawal of French advisory and training personnel.[167] These changes were reported to the International Control Commission set up by the Geneva Accords.[168]

By 1961, although the International Control Commission was still in existence (it is today for that matter) and although references and recriminations regarding the Geneva Accords were current[169] (the same is true today) and although even today a "return to the Accords" is offered by some as a "solution" to the Vietnam conflict, the detailed provisions of the Geneva Accords were a dead letter so far as controlling intervention on behalf of the Republic of (South) Vietnam is concerned. That being the case, and putting aside the Accords, the question is then: Did the Republic of (South) Vietnam have the right to ask the United States to intervene on its behalf?

To answer that question one must first answer two others: Is the opposition to the government of the Republic of (South)

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[166] Meeker, *supra* note 158, at 483.

[167] *Id.*

[168] *Id.*

[169] *Id.* "[T]he Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communist terrorism in the South . . . ."

Vietnam a strictly grass-roots rebellion? The answer to that seems evident: No. Is Vietnam entitled by the principle of self-defense to ask for assistance against subversion or is self-defense and its ramifications limited to frontal attacks by organizations of armed forces massed at the border? One would think that the answer to this question would be relatively short and simple, but it seems to have called for considerable thought by a number of scholars.

The question presents a double-barrelled problem. The first calls for a bit of soul-searching. Whenever a government faced with an opposition which is a mixture of internal rebellion and external subversion gets outside assistance, it is presumed that the assistance, military or otherwise, will not be limited to eliminating the external threat. Doesn't this endanger, in fact strangle, the principle of self-determination?

The second barrel is concerned with article 51 of the U.N. Charter. With regard to the principle of self-determination, it seems that it merits respect only so long as it remains pure. "Indeed, almost all illegal [subversive] interventions are accompanied by some internal support." [170] One cannot assess whether the illegal intervention is simply for the altruistic purpose of assisting the "outs" to become the "ins" and thereafter retiring from the scene. This is highly unlikely. Therefore, there has been no alteration of the longstanding rule prohibiting outside support for rebels.[171] The view suggested by Professor Wright (that the provisions of the United Nations "prohibit only the threat or use of armed force or an armed attack. They cannot be construed to include other hostile acts such as propaganda, infiltration or subversion," [172]) is not simply

[170] Comment, *supra* note 160, at 526.

[171] "(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions. (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State [are offences against the peace and security of mankind and crimes under international law]." Draft Code Offenses Against the Peace and Security of Mankind, art. 2, paras. 4 & 5, as read with art. 1, adopted by the International Law Commission, 28 July 1954, as appears in BASIC DOCUMENTS OF THE UNITED NATIONS 99 (Sohn ed. 1956).

[172] Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521, 529 (1960).

unacceptable, it is ill-advised. Such an approach to the problem equates totalitarian world dictatorships to world peace. Therefore, self-determination must make its impression without an assist from subversive intervention.

The interpretation of article 51 [173] of the U.N. Charter, particularly with reference to the Republic of (South) Vietnam, is quite an interesting exercise. South Vietnam is not a member of the United Nations because of a veto imposed by the Soviet Union and has, therefore, not formally undertaken the obligations of the United Nations Charter, but "much of the substantive law of the charter has become part of the general law of nations through a very wide acceptance by nations the world over." [174]

William L. Standard, Chairman of the Lawyers Committee on American Policy towards Vietnam, and one of the principal spokesmen in the United States against the legality of United States assistance to the Republic of (South) Vietnam,[175] sees the United Nations Charter as twice-fatal to the legality of United States intervention on behalf of South Vietnam. Mr. Standard grants, in the abstract, the right of a nonmember of the United Nations to defend itself, but denies the legality of cooperation in the defense by a member of the United Nations without United Nations authorization.[176] His *coup de grace* for the already "fatally" wounded cooperation is his conclusion that:

> Under the clear text of Article 51 of the charter, the right of self-defense arises only if an "armed attack" has occurred. . . .
>
> "Self-defense" is not justified by every aggression or hostile act, but only in the case of an "armed attack," when necessity for action is "instant, overwhelming, and leaving no moment for deliberation."[177]

After stating the position of the Lawyers Committee that

[173] Art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[174] Meeker, *supra* note 158, at 476 n.3.

[175] Standard, *United States Intervention in Vietnam is Not Legal*, 52 A.B.A.J. 627 (1966).

[176] *Id.* at 628.

[177] *Id.* at 629.

"Article 51 applies only if an armed attack occurs against a member of the United Nations," Mr. Standard reasons:

> This limitation was not inadvertent. It was the result of careful draftsmanship by Senator Arthur H. Vandenburg, who "was the principle negotiator in the formulation of this text" of Article 51. In a statement of June 13, 1945, before the United Nations Commission that drafted Article 51, Senator Vandenberg said: ". . . [W]e have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us [*i.e.*, members of the United Nations] or any qualified regional group of states to ward off attack . . .".[178]

This Mr. Standard interprets as reserving the right exclusively for members of the United Nations. The parenthetical which Mr. Standard put in brackets is Mr. Standard's addition to the thought expressed by Senator Vandenberg. At the time Senator Vandenberg was speaking, the United Nations was not as yet firmly created. Could his ". . . any state among us . . ." mean that this organization still aborning presumed to preclude nonmembers from defensive alliances, or at least from defensive alliances with United Nations members? That is hardly a necessary, let alone reasonable, interpretation. It would mean that nonmembers, some of them (such as South Vietnam) ostracized simply by the veto of a permanent member of the Security Council, must stand alone against all comers until such time as the United Nations Organization decided upon appropriate action.

To further bolster his position, Mr. Standard quotes Secretary of State John Foster Dulles:

> Any intervention by the United States and/or Russia or any other action [in the 1956 Suez crisis], except by a duly constituted United Nations peace force would be counter to everything the General Assembly and the Secretary-General of the United Nations were charged by the Charter to do in order to secure a United Nations police cease fire.[179]

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[178] *Id.* at 628 (brackets in original; footnotes omitted). Mr. Standard's quote is taken from the following passage contained in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1072 (1965), which he cites:

"Third, we have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us or any qualified regional group of states to ward off attack pending adequate action by the parent body. And we specifically recognized the continuous validity of mutual protection pacts to prevent the resurgence of Axis aggression, pending the time when all the states concerned may be satisfied to rest this exclusive responsibility with the new organization."

[179] Standard, *supra* note 175, at 628 (citing New York Times, November 6, 1956).

Mr. Standard omits the fact that, at the time Mr. Dulles spoke, the United Nations had taken cognizance of the Suez crisis. Certainly the purpose of the United Nations is to supply a means of dealing with threats to the peace in a manner more satisfactory than individual or decentralized State reaction. When the United Nations undertakes to fulfill its purpose in a particular case, of course individual member states are expected to refrain from interfering with that undertaking and give the United Nations an opportunity to function. But accession to the United Nations Charter is not an unconditional limitation on State prerogatives. In the present condition of world politics it is unrealistic to expect the United Nations to respond effectively to all, or even most, threats to the peace. States must fall back on the older decentralized methods when the United Nations is unable to cope with the situation.

It is contended that, before any but peaceful action is taken by individual members to meet threats to the peace or aggression, the dispute should be brought before the United Nations. Support for this contention is found in article 37 of the Charter. But the parties to the "dispute" are not, by the Charter, the only competent relators of the problem.[180] From 1954 until 1964, no State brought the question of the Vietnam conflict to the United Nations. "In August 1964 the United States asked the [Security] Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf." [181] Twice since, in February 1965 and January 1966, the United States has taken the entire matter to the Security Council, at that latter date submitting a draft resolution "calling for discussions looking toward a peaceful settlement on the basis of the Geneva Accords," but the Council has taken no action to restore peace and has "been notably reluctant to proceed with any consideration of the Viet Nam question." [182]

If there ever was a doubt that nonmembers may legally form defense alliances and that United Nations members may legally join such alliances and act pursuant to the alliance agreement, the doubt should long since have been dislodged. However much a panacea the United Nations was intended or expected to be,

[180] Comment, *supra* note 160, at 528, points out the applicability of articles 33 and 37.

[181] Meeker, *supra* note 158, at 479 (citing U. S. Representative Stevenson's statement in the Security Council on 5 August 1964, in 51 DEP'T STATE BULL. 272 (1964)).

[182] Meeker, *supra* note 158, at 479.

it cannot be said with conviction that the United Nations has taken such "effective collective measures to deal with threats to the peace" that the nations of the world, members or not, can rely on that body. Thus, alternative methods have been sought. These alternatives cannot be said to be illegal simply because the United Nations Charter and the United Nations Organization exist.

Now let us assess the meaning of article 51, and particularly the phrase "if armed attack occurs. . ." It is the contention of Mr. Standard that:

> "Self-defense" is not justified by every aggression or hostile act, but only in the case of an "armed attack", when the necessity for action is "instant, overwhelming, and leaving no moment for deliberation". This definition was classically stated by Secretary of State Daniel Webster in *The Caroline* . . . .[183]

It is true that Daniel Webster's classic statement was acquiesced in by the British during discussions of the *Caroline* incident. But the British never agreed that the classic principle was violated by the destruction of the private craft, *Caroline*. After some years the case was amicably settled but was never arbitrated or decided by a judicial tribunal.[184] It has been said that "Webster's statement that the necessity of self-defense in such cases should be 'instant, overwhelming, and leaving no choice of means, and no moment for delibera-

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[183] Standard, *supra* note 175, at 629 (citing VII MOORE, DIGEST OF INTERNATIONAL LAW 919 (1906).

[184] *See* II MOORE, DIGEST OF INTERNATIONAL LAW 409–14 (1906). Perhaps a fuller rendition of what Webster said to Lord Ashburton would be enlightening. "Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'

"Understanding these principles alike, the difference between the two governments is only whether the facts in the case of the *Caroline* make out a case of such necessity for the purpose of self-defence. Seeing that the transaction is not recent, having happened in the time of one of his predecessors, seeing that your Lordship, in the name of your government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing that it is acknowledged that, *whether justifiable or not*, there was yet a violation of the territory of the United States, and that you are instructed to say that your government consider that as a most serious occurrence; seeing, finally, that it is now admitted an explanation and apology for this violation was due at the time; the President is content to receive these acknowledgements and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussions between the two governments." *Id.* at 412 (emphasis added).

tion' has become historical, although doubtless not tenable in its literal form." [185]

The Lawyers' Committee on American Policy Toward Vietnam prepared a Memorandum of Law contradicting the legality of the United States participation, which was inserted in the Congressional Record on 23 September 1965, by Senator Wayne Morse. The memorandum alleges that the founding nations of the United Nations

> rejected the use of force based on the familiar claim of "anticipatory self-defense," or "intervention by subversion" . . . . More importantly for our purposes here, however, the United States was aware of these precepts before the Senate ratified the United Nations Charter and consciously acquiesced in their rejection as a basis for independent armed intervention.[186]

The allegation rests upon a citation to "Hearings on U.N. Charter, Committee on Foreign Relations, U.S. Senate, 79th Congress, 1st Session, July 9–13, 1945, at p. 210." The Lawyers Committee must have reference to the revised edition of the report of those hearings, since the unrevised edition at page 210 carries testimony of a David Darrin urging non-ratification of the treaty, and not discussing article 51. The revised edition of the hearings contains a brief reference to article 51. Here, the sense of the comment was that the "supremacy of the Security Council in enforcement measures to prevent aggression . . ." is tied to the supposition that armed forces would be put at the disposal of the military staff committee and the Security Council.[187] In other words, the "supremacy of the Security Council" had the premise that the Security Council was going to *function* in this problem area.

Mr. Standard agrees that aggression may come in forms other than armed attack but insists "the peacekeeping procedures of the United Nations for collective redress against aggression" are the only legal means of meeting aggressions other than armed attack.[188] The laudable intent of those conscientious drafters of the United Nations collective security scheme cannot rest upon its laurels. Neither can the laurels won in conference rooms twenty-two years ago carry the day in today's world. There is no collective security police force,

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[185] FENWICK, INTERNATIONAL LAW 231 (3d ed. rev. & enl. 1948).
[186] 111 CONG. REC. 24902, 24904–05 (1965) (footnote omitted).
[187] *Hearings on U.N. Charter Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess., at 210 (rev. ed. 1945).
[188] *See* Standard, *supra* note 175, at 629–31.

and the United Nations Security Council has demonstrated that, particularly in cases playing key roles in the struggle between the free world and community forces, the Security Council cannot be relied upon to take effective action. Therefore, individual states cannot legally be precluded from employing adequate measures of self-defense, simply because the aggression they face comes clandestinely rather than by massed frontal attack.

The Republic of (South) Vietnam has called upon the United States for assistance in defending against aggression launched by the Democratic Republic of (North) Vietnam. The United States has decided to honor that request. This form of intervention is in accordance with international law.

V. CONCLUSION

International law has developed a framework defining and limiting the legal prerogatives of individual states in their decisions to exercise power in a decentralized society. It has taken centuries to develop this framework, and even so it is not altogether without fault. But the framework is usable and reasonable for a decentralized society.

During the mid-twentieth century, many of the states of the world have taken a step toward centralizing the power structure of the world community by creating the United Nations. The ideals expressed in the United Nations Charter are indeed desirable. The United Nations is contributing substantially to improving the conditions under which people of the world are living. But the United Nations does not exercise a force monopoly. The world community is not ideologically ready for the United Nations, or any other entity, to exercise a force monopoly. While this continues to be so, individual states should frame their decisions to exercise power within the international law as it has developed through the centuries and conscientiously relate their decisions to exercise power to the *ideals* expressed in the United Nations Charter. But they cannot be legally limited by unrealistic interpretations of specific provisions of the Charter.

THE OVERSEAS COMMANDER'S POWER TO REGULATE THE PRIVATE LIFE*

By Major Wayne E. Alley**

This article contains an analysis of the extent to which an overseas commander may lawfully regulate the personal, off-duty activities of service members, civilian employees, and dependents in his command. The author dicusses the necessary relationship between lawful regulations and military interests, with emphasis upon particular military interests which may justify regulations, and develops legal guidelines to assist overseas commanders in the issuance of regulations of this nature.

I. INTRODUCTION

A. *NATURE OF THE MILITARY COMMUNITY OVERSEAS*

United States military communities overseas are easier to describe by composition than by relationship with surrounding local communities. Except in a few places, a United States post or base will be peopled with servicemen, civilian employees of the service, and dependents of both of these. On the fringe of the military community, but more a part of it than of the local population, are workers whose employment is not with the military but exclusively for it. Examples are Red Cross staffs, technical representatives of businesses whose products are in the military inventory, and performers of United States contracts.

This article will not be concerned with Alaska or Hawaii, but only with posts and units in foreign countries. The significant

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** JAGC, U. S. Army; Instructor, Military Affairs Division, The Judge Advocate General's School, U.S. Army; B.A., 1952, LLB., 1957, Stanford University; member of the bars of State of Oregon, State of California, and United States Court of Military Appeals.

differences in the latter overseas military communities derive from the varying circumstances under which they are present. These circumstances are legal, which relate to the agreement under which American forces entered and remain in the host nation; economic, which relate to the health of the local economy and American endeavors to assist it both through agencies and through individual servicemen or accompanying civilians; social, which relate to local customs and attitudes, particularly as they compare to ours; and merely coincidental, which relate to such matters as how many people live off post and how many are married to local residents.

As it is quite evident that a commander's power to regulate the affairs of his military community is dependent, if not upon an absolute necessity to regulate, at least upon a nexus between the subject of regulation and some military interest, the precise limits of the power will differ from place to place. The local circumstances will to some degree define the military interest in personal conduct. Because of this, the general conclusions and remarks which follow, insofar as they treat of specific exercises of command power, may not universally be apposite in every command. But they will be apposite unless the local circumstances within a command are unusual.

B. *COMMAND REGULATIONS AS LEGISLATION*

Throughout this article, the phrases "private life" or "personal activities" or "personal affairs" refer to activities which are not in furtherance of actual military employments such as training, combat, or maintenance of facilities and equipment. "Command regulation" means a directive from a commander to military members under his command, to civilians working for organizations under his command or military supervisory control, to accompanying dependents, or to any of these.

Command regulations possess all the incidents of statutory legislation except that of promulgation by a legislative act. The regulatory provisions are directed to the members of the command generally or to those in an affected class. Some are prohibitory, some directory, and some merely declaratory of customs and policies that obtain in the military. The nature of command regulations as enforceable rules of daily life laid down in so many words (but subject to construction) is shared with statutes. This is not to say that the mode of promulgation does

not work important differences in the provisions themselves. Legislative enactment and command promulgation are not merely two different ways of getting the binding words of the rules down on paper and distributed; the modes of promulgation affect the rules themselves. Enactment is a political process, so its product often is a compromise and well within the ultimate limits of possible governmental control of conduct. It is also often preceded by the political processes of eliciting information and molding opinion toward widespread acceptance of the act as a desirable piece of legislation. The legislators do not want to imperil themselves politically before a substantial portion of the electorate.

In contrast, military command regulations may be arbitrarily promulgated. This observation is not intended to be pejorative but simply descriptive of command power, which is without political circumscriptions (in the sense of political processes, as opposed to political considerations). The regulations certainly need not necessarily reflect the desires or attitudes of those who are expected to conform.

This is the background—the mode of promulgation as it tends to affect the content of the promulgated rules. The foreground of our interest is the rules themselves and whatever similarities of treatment may be perceived between statutes and regulations.

Command regulations in the nature of penal statutes ought to be strictly construed.[1] Perhaps they should be even more strictly construed against the government in criminal prosecutions than statutes would be, because a single person—the commander—has the absolute power to make the rules as stringent as he

[1] A rule of strict construction was announced and purportedly applied in ACM 9659, McLeod, 18 C.M.R. 814 (1955), but the board of review concluded that an Air Force departmental regulation prohibiting the acceptance of gratuities which might "reasonably be interpreted as influencing" the recipient's impartiality was not invalid for vagueness and, as reasonably construed, rendered the accused's receipts criminal. *See also* United States v. Sweitzer, 14 U.S.C.M.A. 39, 33 C.M.R. 251 (1963); ACM 19353, Henderson, 36 C.M.R. 854, 857 (1965): "Where a regulation forms the basis for a criminal prosecution, the part alleged to have been violated must be measured by the standards set for penal statutes. These rules require that a penal regulation be definite and certain, that it be strictly construed and that any doubt with respect to it be resolved in favor of the accused." Applying these standards, the board of review decided that the regulatory provision in issue was so broad, vague and hortatory in tone that it could not have been intended by the promulgator to be a regulation capable of being violated in the penal sense at all.

unilaterally wishes them to be, within the limits of legality discussed below. And because of this power, there should be no objection to measuring the regulations against the same standards of comprehensibility and definiteness as would be essential to a statute's validity. If a regulation would fail as a basis for criminal prosecution if it were a statute, it should fail as a regulation for the same reason.[3]

The consequences of criminal conviction may be so severe that our military system of criminal law does not normally punish conduct unaccompanied by some sort of criminal intent.[3] A regulation which, if violated, would result in punishment for a mere occurrence without regard to an accompanying intent at least to bring it about, or to some degree of negligence in failing to preclude it, or to some other subjective culpability, is hardly an instrument of justice.[4] But, as may a statute, a regulation may quite properly proscribe an intentional but essentially harmless and morally innocent act or transaction falling within the purview of regulatory power,[5] for the purposes of the regulation may be achieved only through strict compliance. A number of morally innocent transactions may cumulatively snowball into the very evil sought to be avoided by the commander. The most temperate and mature of noncommissioned officers may be precluded from having a single bourbon highball in his barracks, even though his commander would freely concede the harmlessness of such conduct by him alone.

A fundamental similarity between statutes and regulations is illustrated in *United States v. Sandoval*,[6] where the accused

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[3] CGCMS 21398, Midgett, 31 C.M.R. 481 (1962).

[3] *See* United States v. Doyle, 3 U.S.C.M.A. 585, 14 C.M.R. 3 (1954).

[4] Recognizing this, a Navy board of review has held invalid a Treasure Island, California, station regulation providing, "It shall be an offense for any person . . . to lose his identification card or liberty card." Construing this inartfully drawn clause to be a prohibition against "losing" either type of card, the board properly concluded that a commander cannot by article 92 convert a mere happen-stance into a crime. NCM 198, Flanagan, 9 C. M. R. 574 (1953).

[5] *See* CM 354857, Lowry, 8 C.M.R. 344 (1952), in which the board of review assumed the validity of Eighth United States Army regulations addressed to black-marketing, which were held to have proscribed the accused's selling his automobile to a Korean at an entirely reasonable price. He could have got several hundred dollars more merely for the asking, but made a deliberate decision for fair dealing. The regulations were obviously issued because of economic, not moral, incidents of American-Korean relations.

[6] 4 U.S.C.M.A. 61, 15 C.M.R. 61 (1954).

sought an instruction on the defense of accident in a prosecution for article 118(3),[7] murder. Judge Latimer was of the opinion that, not only was no issue of accident raised (a conclusion in which the other two judges of the United States Court of Military Appeals concurred), but the defense was barred because the accused pleaded guilty to violating regulations by carrying the weapon he used in the slaying. He thereby conceded that he was not engaged in a lawful act, and the defense of accident could not apply. Assuming a regulation is lawful would it not always follow that a violation is not only punishable under military law but is unlawful conduct no matter what the purpose of scrutiny?

Just as a statute may be held to be invalid because in conflict with the fundamental law, an order or regulation may be invalid because of conflict with an overriding rule such as a statue[8] or regulation issued at a higher military level.[9] In a newspaper story, "E5 Car Rule is Strictly Illegal,"[10] the latter sort of conflict is rather sensationally reported. An "Army lawyer" spokesman for Headquarters, United States Army Europe, is described as having condemned subordinate commands for issuing blanket prohibitions against lower ranking enlisted men's having and operating their own automobiles, because the theater-wide regulations on the same subject were permissive and contemplated individual evaluations of requests. Such stories, whether or not entirely accurate, are reminders that every commander is in turn commanded.

Except for such commonplace proscriptions as "No alcoholic beverages are permitted in barracks," few regulations can be drafted with decalogue-like simplicity. The same plaguing problems of definitions, limits of application, and exceptions are met by legislators and commanders alike. Whenever a statute or regulation contains exceptions to prohibitions, the prosecution faces problems of construction, of burden of going forward with the evidence, and of burden of persuasion. At the outset of any such case, the question arises whether the statute or regulation is permissive with prohibited exceptions, or prohibitive with permitted exceptions. The reasonable rule to be applied in the former in-

[7] UNIFORM CODE OF MILITARY JUSTICE art. 118(3) [hereafter called the Code or the Uniform Code and cited as UCMJ].

[8] *See* United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958). *Compare* CM 146727 (1921), as digested in DIG. OPS. JAG 1912–1940, § 422 (6), *with* United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63 (1955).

[9] Op. JAGAF 1954/12, 28 May 1954, 4 DIG OPS. 705 (1955).

[10] Overseas Weekly, 11 Oct. 1964, at 5, col. 1.

stance, particularly when the edict describes the circumstances under which a transaction may be done and by mere implication prohibits other means,[11] is that the government must persuade the fact-finders beyond a reasonable doubt that the accused's conduct is not within the specific authorization.[12]

The second type of case can be more complicated[13] and filled with pitfalls. Shortly after the Uniform Code was enacted, an Army board of review, considering a conviction under a Far East Command regulation which prohibited possession of instruments for administering narcotics "except . . . for the treatment of disease," set aside findings of guilty because the accused "showed by compelling evidence that the instruments in his possession were for . . . [such] treatment. . . ." He therefore "carried any burden he may possibly have had. . . ." [14] A few months later the Court of Military Appeals, citing Mr. Justice Cardozo's opinion in *Morrison v. California*,[15] recognized the essential fairness of requiring another accused to bear some sort of burden to get himself under the same exception in the same regulations once the government's evidence puts him clearly into the generally prohibited realm of conduct.[16] Both the Court's own opinion and the extensive quotations from Mr. Justice Cardozo are curiously unsatisfying in failing to describe the nature of the accused's burden or how it may be borne, perhaps because at trial the particular accused failed even to try to invoke any exception in any manner.

The proper judicial handling of exceptions in regulatory provisions was refined by the same court in *United States v. Blau*.[17] A European Command regulation had prohibited certain types of currency conversions, except under strictly controlled conditions. Recognizing that the tenor of the provisions was to prohibit conversions and not to permit them, the Court concluded that the exceptions constituted no part of any offense; they merely established conditions under which otherwise clearly unlawful conduct would be lawful. So, the opinion reiterated the rule that the government need not as part of its case-in-chief introduce

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[11] A so-called "residual prohibition."
[12] *See* ACM 15104, Upchurch, 26 C.M.R. 860 (1958).
[13] *See* United States v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. 232 (1954).
[14] CM 356277, Durham, 6 C.M.R. 320 322 (1952).
[15] 291 U.S. 82, 88–91 (1934).
[16] *See* United States v. Gohagen, 2 U.S.C.M.A. 175, 7 C.M.R. 51 (1953).
[17] 5 U.S.C.M.A. 232, 17 C.M.R. 232 (1954).

any evidence tending to show that the exceptions did not apply. What should an accused do at trial to invoke an exception sufficiently well to have a chance of acquittal? According to the Court, "Without any demand that he take the stand himself, an accused in such a case as this could readily *demonstrate* that he fell within an excluded class. . . ."[18] (Emphasis added.) In ordinary discourse, to "demonstrate" means affirmatively to show—and strongly. The government's position in *Blau* was only that the accused had the burden of going forward with evidence that an exception applied.[19] Quite obviously, the author judge unnecessarily overstated the Court's agreement with this position.

Perhaps if more accused persons had been more successful in affirmatively invoking exceptions at trial but been convicted notwithstanding, the nature and extent of the accused's burden would soon have been dscribed. As it is we are guided by dictum, but most persuasive, in *United States v. Mallow*.[20] The proper approach to exceptions is this: If the government's evidence tends to show that the accused did something which is generally prohibited, and if its evidence does not itself tend to show that an exception permits the act,[21] the accused has a choice. He can either raise an issue that an exception applies or do nothing and suffer the court to infer that none does. If he selects the former, "he may raise reasonable doubt about his guilt, and in the final analysis, the burden does not shift from the Government to establish the offense beyond a reasonable doubt."[22]

This discussion of the similarities between regulations and statutory legislation, which has thus far summarized certain mutually applicable rules of construction, limitations on the power to prohibit conduct, and problems raised by qualifications and exceptions to prohibitions, should conclude by stating the obvious. The legislature and the commander possess alike the awesome power to create offenses and to prescribe that heavy penalties shall follow upon judicial findings that their rules have not been followed. This is an extremely serious consequence of a commander's decision. Consider for instance that appellate bodies

[18] *Id.* at 241, 17 C.M.R. at 241.
[19] *Id.* at 237–38, 17 C.M.R. at 237–38.
[20] 7 U.S.C.M.A. 116, 21 C.M.R. 242 (1956).
[21] *Cf.* United States v. Gordon, 14 U.S.C.M.A. 314, 320 n.3 34 C.M.R. 94, 100 n.3 (1963); United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).
[22] United States v. Mallow, 7 U.S.C.M.A. 116, 125, 21 C.M.R. 242, 251 (1956).

many times have assumed the legality of regulations prohibiting the possession of syringes and the like—instruments for administering narcotics.[23] Such a regulation creates an offense in the truest sense, for without it the very same conduct is not punishable, at least not under article 134 of the Uniform Code.[24] Thus, it may be said that a lawful regulation (known to an accused if that be a condition of its judicial enforcement) is not merely *like* legislation, it *is* legislation. The draftsman must approach his task accordingly, appreciate the necessity for definiteness, and recognize the problems inhering in providing exceptions to more general prohibitions.

C. *PERVASIVE EFFECT OF COMMAND REGULATIONS*

Granting that lawful command regulations are like legislative acts, the legal milieu of the armed forces overseas is made up in part by the total body of such regulations in effect. The other parts of this milieu are made up by United States statutes (including the Uniform Code) applicable to the service member, employee, or dependent; other executive promulgations;[25] and so much of the local law to which he or she is amenable. The proportion of the parts is within the power of the commander to determine, for he may issue directives governing either a narrow or a broad range of conduct. It may well be true—and one suspects it actually is in most overseas commands—that in sheer bulk and complexity directives regulating the personal life of individual members of the armed forces community far outweigh both the Uniform Code and the local criminal code combined.

United States Army Japan is a typical overseas command, whose Office of the Staff Judge Advocate responded to a request by the author for copies of pertinent directives in effect. Some addressed to personal conduct or transactions merely declare policy[26] or assign responsibilities.[27] A member of that command is subject

[23] *E.g.*, United States v. Meadows, 7 U.S.C.M.A. 52, 21 C.M.R. 178 (1956); United States v. Berry, 2 U.S.C.M.A. 374, 9 C.M.R. 4 (1953); ACM 4957, Thomas, 4 C.M.R. 729, *pet. denied*, 2 U.S.C.M.A. 663, 4 C.M.R. 173 (1952).

[24] CGCM 9813, Lefort, 15 C.M.R. 596 (1954).

[25] *See, e.g.*, United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963).

[26] *E.g.*, Hq. U.S. Army Japan Reg. No. 1–7, paras. 4a & b (10 June 1964) [hereafter cited USARJ Reg.], exhorting members of the military community to pay their bills and their commanders or staff supervisors to instruct upon the virtue of financial responsibility.

[27] *E.g.*, USARJ Reg. 1–32 (30 July 1963), dividing up responsibilities for disciplinary control of service members.

to and for his own sake ought to be familiar with the other directives regulating (in the penal sense) substantial, important, and sometimes very personal areas of his life's activities, for example: preventing making certain kinds of gifts;[28] prohibiting bringing certain types of property into Japan or transferring it thereafter;[29] limiting sources of acquiring currency;[30] prohibiting politicking;[31] placing businesses off limits;[32] restricting the possession, use, and transfer of weapons;[33] prohibiting or regulating the use and possession of certain drugs and instruments for their administration;[34] prescribing conditions of ownership of privately owned dependent housing;[35] limiting channels of personal communication to military post offices and other facilities approved by the command's chief censor;[36] controlling the purchase and disposition of a host of items for which, it is felt, local residents have a yen;[37] insisting upon a program of weight reduction for the obese;[38] circumscribing off-duty commercial activities or employment;[39] prohibiting borrowing from subordinates and loaning to any other members of the command at a true interest rate over six per cent per annum;[40] setting (rather vaguely) standards of attire for civilian clothing;[41] placing roadblocks on the path to matrimony;[42] circumscribing the acquisition, use, and disposition of motor vehicles;[43] and regulating all currency transactions.[44]

All these regulations, not to mention those of organizations inferior to United States Army Japan constitute so complete and pervasive a set of rules of conduct that they might be called an

[28] USARJ Reg. 1–1, para. 4e(3) (23 July 1963).
[29] *Id.* paras. 5a–d, 1.
[30] *Id.* para. 5j.
[31] *Id.* para. 5r.
[32] USARJ Reg. 190–1 (25 May 1964).
[33] USARJ Reg. 190–6 (9 Sept. 1963), with Change 1 (21 July 1964).
[34] USARJ Reg. 190–9 (11 Dec. 1963).
[35] USARJ Reg. 210–13 (5 Sept. 1963); USARJ Reg. 420–1 (10 Sept. 1963).
[36] USARJ Reg. 380–200, para. 8 (5 June 1963).
[37] USARJ Reg. 600–3 (3 Dec. 1963), with Change 1 (23 March 1964).
[38] USARJ Reg. 600–7 (10 Jan. 1964).
[39] USARJ Reg. 600–50, sec. IV (30 July 1964).
[40] *Id.* sec. V.
[41] USARJ Reg. 600–53 (30 July 1964).
[42] USARJ Reg. 600–240 (7 Feb. 1964).
[43] USARJ Reg. 643–2 (27 Jan. 1964); *see also* Army Reg. No. 55–76, para. 8 (11 July 1962).
[44] Hq. U.S. Forces Japan, Policy Letter 173–2 (20 April 1961), with Change, Policy Letter 173–2A (13 Aug. 1962), a document of over thirty pages of text with six attachments.

administrative criminal code. In Japan, this code's complexity might have been greater had the parent command—United States Army Pacific—been issuing the same sort of regulations applicable theater-wide. Fortunately for simplicity's sake, the parent command has not done so. [45]

In Europe, the administrative criminal code is made more complicated because its sources are numerous. There are tiers of regulations corresponding to the tiers of headquarters in the theater.

Since August 1963, Headquarters, United States European Command, has assumed responsibility for issuing so-called "Country Regulations"—fundamental directives prescribing, prohibiting, and regulating personal conduct in accordance with our international agreements with the several nations in the theater and with the applicable local laws. The headquarters has already issued such regulations for France, Federal Republic of Germany, Italy, Libya, Morocco, Netherlands, Norway, Spain, and Turkey; those for Greece and the United Kingdom are in preparation. Insofar as is possible, the various regulations are similar in subject matter.[46] Those for France,[47] as an example, contain provisions pertaining to currency control, acquisition and disposition of personal property, customs control, firearms, and privately owned motor vehicles.

At the next lower level of command for Army personnel—Headquarters, United States Army Europe—directives have been promulgated generally paralleling many in effect in Japan.[48] And, from this high-level headquarters down to individual company-sized units, commanders are, in their judgment, "commanding what is right and prohibiting what is wrong."[49] For example, in Headquarters Company, Seventh United States Army, the troops are informed:[50]

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[45] Letter from Army Staff Judge Advocate, Hq. U.S. Army Pacific, to author, 9 Nov. 1964.

[46] Letter from Legal Advisor, Hq. U.S. European Command, to author, 10 Nov. 1964.

[47] Hq. U.S. European Command, Directive No. 30–20 (5 June 1964).

[48] *Compare* Hq. U.S. Army Europe [hereafter cited as USAREUR] Circular No. 192–30 (13 March 1958) *with* USARJ Reg. 190–1 (25 May 1964) (off-limits areas); USAREUR Reg. 643–30 (4 Dec. 1963) *with* USARJ Reg. 643–2 (27 Jan. 1964) (control of privately owned motor vehicles); and USAREUR Reg. 643–70 (12 Feb. 1963) *with* USARJ Reg. 190–6 (9 Sept. 1963), with Change 1 (21 July 1964) (control of firearms and other weapons).

[49] 1 BLACKSTONE, COMMENTARIES * 44, admittedly quoted out of context but nevertheless apposite.

[50] Hq. Co. Seventh U.S. Army, Company Policies, sec. X, para. 9 (1 July 1962).

> Photos, films, or drawings of nude or partially clothed humans [51] will not be stored, displayed or possessed in the company area. The *only exception* to this order is that U.S. magazines sold through [the European Exchange Service] . . . may be present in the billets.[52] [Italics in original.]

The problem to be expected in a hierarchical system of regulations is inconsistency or conflict between provisions promulgated at the various levels of command.[53] Although regulations do not come at the individual soldier from all different directions—without exception they come from above—they do come from different distances and with different intensity which varies according to the elevated remoteness of the issuing headquarters. But sometimes a soldier is able to thwart conviction for violating a unit order on the ground of some overriding provisions issued from afar. In the summary court-martial case of one Specialist Four Dennis L. O'Connor,[54] findings of guilty of failing to obey the company commander were set aside by the convening authority and charges dismissed on the ground that what his commander had prescribed was itself prohibited by higher authority.[55]

Specialist O'Connor's case illustrates quite well the pervasive effect of command directives on the individual soldier's private life. His unit commander had issued a blanket prohibition against loaning automobiles without his (the commander's) consent. The higher headquarters' regulations[56] on the same subject—operation of a vehicle by a person other than its owner[57]—was by implication entirely permissive and did not seem to contemplate a unit commander's exercising any control over the loaning of automobiles in his unit. To this extent, a blow was struck for

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[51] This directive antedated the brief, well-publicized campaign of 1963 to "clothe our animals decently."

[52] Presumably the excepted publications referred to are those containing what would otherwise be prohibited pictures.

[53] See note 9 *supra* and accompanying text.

[54] Summary court-martial case No. 2, Hq. Seventh Army Support Command (1963).

[55] The basis for the convening authority's action is explained in Disposition Form, subject: Summary Court-Martial of Sp4 (E–4) Dennis L. O'Connor, form Staff Judge Advocate to Commanding Officer, Hq. Seventh Army Support Command, 8 Aug. 1963.

[56] USAREUR Reg. 643–30 (30 Nov. 1961) (superseded by USAREUR Reg. 643–30 (4 Dec. 1963)), which provided in para. 3d: "The provisions of these regulations are exclusive and not subject to interpretation [query if this be possible] or amplification."

[57] USAREUR Reg. 643–30, para. 28 (30 Nov. 1961).

Specialist O'Connor's freedom to engage in property transactions. But even more significant are the prohibitive and prescriptive portions of the higher command's regulations, a document of about twenty-five pages of text and eight pages of annexes. Most of the document is restrictive, not permissive, and touches deeply one of life's most meaningful relations for many a young soldier—that between him and his car.[58] As was demonstrated in Japan, few of life's activities are not either the subject of or affected by the strictures of the administrative criminal code.

II. LEGAL PROBLEMS UNDERLYING THE EXTENT OF *A COMMANDER'S POWER TO ISSUE REGULATIONS*

A. *TYPES OF PRECEDENTS AND AUTHORITIES*

Both administrative and judicial opinions have recognized that the very fact that a commander is overseas is pertinent in ascertaining the extent of his lawful powers to regulate the private affairs of subordinates.[59] A commander may be able to exercise a degree of control overseas substantially greater than that permitted in the United States. Absent extraordinary facts, command regulations held lawful in the United States should therefore be lawful if issued in an overseas command.[60] Accordingly, there are cited in this article a few cases arising in the United States; they are so identified.

In very few appellate opinions in cases of disobedience of orders or violating general regulations is the question of the directive's legality specifically discussed as a litigated issue. These few and

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[58] Of course the various nations in the theater have motor vehicle codes of their own. See part IV. G. *infra.*

[59] *See, e.g.,* United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961). *Compare* United States v. Milldebrandt, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958), concerning the extent to which a serviceman on leave is subject to his commander's orders, *with* Hq. Seventh U.S. Army Reg. No. 632–50 (21 Aug. 1964), which restricts a leavetaker's travel into and within a five-kilometer border buffer zone around East Germany and Czechoslovakia. *Compare* JAGA 1958/5147, 10 July 1958, 8 DIG. OPS. 225 (1959), to the effect that a commander has no authority to regulate speed limits on American, German, or French highways, *with* the more recent JAGA 1963/5017, 21 Jan. 1964, [*and*] JAGJ 1963/8424, 11 April 1963, which recognize another rule may apply as to highways in Europe and Taiwan. The importance of the reasoning in these later opinions is greater than a mere statement of the result; see Part IV. C. *infra.*

[60] Pretermitting any questions of restrictions on our commanders imposed by the host governments.

unrepresentative opinions are the important precedents. Because they are so few, they provide better general statements of principles than illustrative specific instances. On the other hand, there are several dozens of cases in which the legality of a pertinent regulation is simply assumed; the court or board attends to other issues, such as knowledge of the regulation or factual sufficiency of the evidence to establish a violation. Are these cases valueless as precedents touching the issue of legality? They should not be so considered, although their value is limited to the extent one can prohphesy therefrom that the same assumptions (if not outright holdings) of legality will be repeated. If the same kind of regulation is assumed to be lawful in case after case, such a prophecy is easier to make. Therefore, this article will refer to several opinions in which such assumptions are made; these also will do so identified.

When several commands issue similar regulations upon the same subject, several senior commanders and judge advocates have certainly coincidentally concluded that such measures are justified by events and are lawful at the time and place of issuance. It is arguable that conclusions so widely shared, as reflected in common regulations, are significant legally. To the extent that the validity of common regulations depends upon some nexus between their subject matter and military duties or requirements, the opinions of those whose perspective is immediate are entitled to some consideration. When commanders all over the world are concerned about the same subject of conduct, perhaps this consideration ought to be quite respectful. Some of the most important regulations, in the sense that they make rather deep inroads into the private life, are quite common.

B. *STATUS AS IT AFFECTS SANCTIONS*

One should not consider the question of issuing and enforcing regulations only in the context of an actual or anticipated court-martial case. A prosecution for violating article 92 of the Uniform Code[61] is only one of several sanctions which may be utilized. When the violator is a service member, his superiors may choose between punitive and administrative sanctions,[62] or in some in-

[61] Denouncing violation or failure to obey any "lawful general order or regulation" and, with qualifications, failure to obey any other lawful order.

[62] "Punitive" sanction means, for this purpose, either trial by court-martial or nonjudicial punishment pursuant to UCMJ art. 15. Concededly, other means of enforcement after the fact of violation (here denominated

stances combine them."[63] When the violator is another kind of member of the military community overseas—a civilian employee or civilian dependent—only the administrative sanctions may be invoked,"[64] at least during peacetime. Some of the administrative sanctions applicable to civilians depend for pertinence upon the type of regulation violated. Obviously, then, the questions of substantive regulation and sanction are so intertwined that a draftsman or commander should formulate the regulatory provisions with applicable sanctions in mind.

The following paragraphs discussing the relationships between a violator's status, sanctions for violations, and substantive provisions violated are intended to be suggestive and allusive rather than exhaustive.

1. *Sanctions Against A Service Member.*

Besides the punitive sanctions,[65] there are two kinds of administrative sanctions which may be applied to service members: those affecting status, and those affecting particular privileges.

The first kind is the more drastic, and within this kind, administrative discharge is the most drastic specific sanction. Every judge advocate is at least generally familiar with Army Regulations Number 635–212,[66] which provides procedures for administrative elimination of unfit and unsuitable enlisted personnel—and every judge advocate is probably at least as confused as personnel administrators are about the proper purview of each of the categories. Whicever provisions are selected—unfitness or unsuitability—a history of contempt for military authority evi-

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"administrative" sanctions) may affect the violator more seriously and may wreak a greater punishment than the "punitive" sanctions from his viewpoint. But "punitive" refers to the mode, not the motive or effect, of enforcement.

[63] For instance, for drunken driving, a trial by court-martial and suspension of driving privileges.

[64] UCMJ art. 15 is by its terms inapplicable to civilian violators in the author's (and the general) opinion. In peacetime, at least, courts-martial may not exercise jurisdiction over the persons of civilian employees (Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960)), or civilian dependents (Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960)).

[65] See note 62 *supra*.

[66] 15 July 1966.

denced by disregard of lawful command regulations ought to suffice as a ground for discharge."[67]

Supplementing the legal rules of res judicata and double jeopardy[68] is a developing policy rule which might be called the "prohibition against successive sanctions." As most recently expressed in Army Regulations Number 635–200, paragraph 1–13,[69] with certain narrow exceptions administrative discharges based upon violations of command regulations would not be permitted if the service member previously had been acquitted of parallel criminal charges, or previously had undergone administrative board proceedings grounded upon the same conduct resulting in retention in the service, or previously had been convicted of such conduct by general court-martial but had not been punished by punitive discharge[70] if the maximum punishment included discharge.

Next to service membership itself, a service member's most significant status is probably that of grade. Grade may be administratively affected on grounds of violations of command regulations either by reduction[71] or by failure to promote or recommend promotion.[72] The developing prohibition against successive sanctions is at least partially incorporated into the provisions governing administrative reduction for acts of misconduct amounting to inefficiency; enlisted men may not be reduced for "actions that have resulted in a court-martial acquittal."[73]

Considerably less drastic are sanctions entailing loss of privileges, which usually are the result of a determination that the serviceman has violated some regulation designed to preclude abuse of the privilege. Of course it is fundamentally unfair to permit arbitrary interference in an individual's important personal activities merely by denominating these activities as "privileges" and concluding from the label alone that they may

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[67] Is it not an utterly subjective determination by a unit commander to choose between proceeding on grounds that the conduct is discreditable (unfitness) or is merely evidence of inaptitude, a character or behavior disorder, or defective attitudes (unsuitability)?

[68] *See* O'Donnell, *Public Policy and Private Peace—The Finality of a Judicial Determination*, 22 MIL. L. REV. 57 (1963).

[69] 15 July 1966.

[70] Or, if his discharge had been suspended.

[71] *See* Army Reg. No. 600–200, chap. 7, sec. VI (Change No. 6, 24 May 1966) [hereafter cited as AR 600–200].

[72] *See* AR 600–200, chap. 7.

[73] *See* AR 600–200, para. 7–30*d*(5).

be permitted or prohibited willy-nilly. In an orderly society even traditionally recognized rights are circumscribed.[74] Other activities, such as purchasing at post exchanges, operating a motor vehicle, or obtaining a pass to travel off post, are not usually thought of as rights but as recognized and expected benefits obtained by conforming with certain conditions under which the benefits are made available. It should follow that the sanction of loss of a specific privilege in fairness should be invoked only if these conditions are made reasonably clear and are reasonably germane to the privilege, and then only if invoked by a clearly identified commander or other authority and with due regard for the importance in individual life of the activity which is the subject of the privilege.[75]

The sanction of loss of a privilege for violating lawful regulatory provisions imposing conditions under which the privilege may be exercised is not the exclusive sanction no matter how closely the privilege and conditions are related. Subject to the limitations contained in the regulations previously discussed in connection with discharges, reductions in grade, and bars to promotion, violation of any command regulations may be grounds for any of those adverse actions affecting status, or for nonjudicial punishment, or for trial by court-martial. Selecting a sanction is within command discretion. However, the fundamental policies in maintaining discipline [76] suggest that, in an instance of abusing a privilege by violating attendant regulatory conditions, withholding the privilege is the preferred sanction unless the violation endangered others or evidenced generally unworthy qualities or attitudes. For instance, if a command maintains a beach and a serviceman violates some promulgated rule of decorum while enjoying it but does nothing too egregious, does not barring him from the beach (or a temporary suspension of the privilege of use) accomplish all the purposes behind promulgating the rule?

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[74] The word "rights" is used here not in a Hohfeldian but in a common parlance sense. For instance a property owner has, in general, a "right" to use the property as he desires but not to violate zoning regulations or harbor a nuisance.

[75] Hq. U.S. Army Ryukyu Islands Reg. No. 190–2, sec. VI (11 Oct. 1963) [hereafter cited as USARYIS Reg.], concerning the revocation or suspension of motor vehicle operator's permits, is an example of an important regulation—from a driver's standpoint—which meets these standards quite well. It specifies who takes action and upon what grounds. The last standard is reflected in a provision for appeals.

[76] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶¶ 128*c*, 129 (Addendum, 1963).

2. *Sanctions Against A Civilian Employee.*

Because, during "peacetime" at least, civilian employees are not amenable to court-martial jurisdiction,[77] whatever control a military command exercises over them by the device of command regulations is measured by the effectiveness of administrative sanctions. These may be of two types: those resulting in loss of privileges, and those affecting employment, such as reprimand, suspension and removal. The former type has already been discussed as it applies to service members; no significant new principles arise merely because the violator of a regulation is not uniformed.

Although Army regulations provide means for applying sanctions affecting military status, they do not prescribe that any of these ought necessarily to follow upon any specific misconduct. In contrast, civilian employment with the Army is subject to a very specific table of standard suggested disciplinary actions (affecting employment) for various types of misconduct,[78] such as insubordination by disobeying orders and deliberate, willful, careless, or negligent failure to observe written regulations prescribed by competent authority.[79] However, in total context, the described derelictions seem to be limited to disobeying or violating orders or regulations which pertain to the job in some way[80] and not to those which simply regulate or prohibit life's personal activities. The limited scope of the table of standard suggested disciplinary actions should not be construed as an implied prohibition against invoking sanctions affecting employment for violating the latter type of regulations even though they have nothing to do with a specific job. The civilian employee overseas lives and works in the military community; it would be intolerable if the commander were barred from using the more grave means of enforcing command regulations meant for the community as a whole. Thus, at least one commander has published his own table of standard suggested disciplinary actions affecting employment, supplementing that in the Civilian Personnel Regulations, which includes as a ground "Engaging in unauthorized activities in

[77] *See* note 64 *supra.*

[78] Civilian Personnel Regulations (Army) No. C2, app. B, table 1 (5 Feb. 1964).

[79] *Id.* items 1, 14, 15.

[80] The table cited in note 78 *supra* does provide a standard administrative penalty for violating a written regulation or order requiring the employee to testify at official investigations and for violating security regulations, but these are duty-related subjects also.

violation of USARJ Regulations 1–1 [Subject: Unauthorized Transactions in Japan] or other USARJ regulations." [81]

Because planning for war ought to include projected use of and control over civilian employees of the Army overseas, one might wonder whether such administrative sanctions are all that will be available to the wartime commander. The *Reid v. Covert*[82] line of decisions[83] arose in peacetime; none was addressed to the constitutionality of article 2(10) of the Uniform Code, which extends court-martial jurisdiction to all persons serving with or accompanying an armed force in the field in time of war. Even Mr. Justice Black, author of the principal opinion in *Reid v. Covert*, despite a general suspicion whether military justice is just,[84] conceded at least the possibility that military trials of civilians are permissible under the circumstances of article 2(10).[85]

Granting the validity of jurisdiction over the person exercised pursuant to that article, the next question is whether a civilian employee is capable of committing the offense of violating a lawful general regulation. Two relatively older board of review cases[86] simply assume no impediments to such a conviction, without discussing whether or not a civilian's status relative to a field commander is such that true command control may be exercised over him. A few years later in *Mallow*[87] the Court of Military Appeals affirmed such a conviction, again without discussing whether the offense of violating a lawful general regulation could be committed by one who is not, in a strictly military sense, under the command of the officer issuing the regulation. *Mallow* was then cited by an Air Force board of review which concluded that a discharged prisoner in military custody, over whom jurisdiction was asserted pursuant to article 2(7) of the

[81] USARJ Reg. 690–22, inclosure 1 (15 May 1964). "Unauthorized" in this provision must mean "prohibited" and not simply "not affirmatively authorized." The regulations of this command, although quite comprehensive, do not purport to state what subject persons *can* do and prohibit everything else.

[82] 354 U.S. 1 (1957).

[83] See note 64 *supra*.

[84] *See* 354 U.S. at 35–38.

[85] *See id.* at 33 & n.60, 34 & n.61.

[86] CM 358803, Garcia, 13 C.M.R. 271 (1953); ACM 5985, Sarae, 9 C.M.R. 633 (1953).

[87] United States v. Mallow, 7 U.S.C.M.A. 116, 21 C.M.R. 242 (1956). Jurisdiction over Mallow was asserted under article 2(11) of the Code rather than 2(10), but it is difficult to see how this could affect his status as one liable for the particular offense charged.

Code, could, as a "person subject to" the Code, be convicted of disrespect to and disobedience of his superior commissioned officer.[88] Necessarily the board decided that the prisoner retained enough military status, although not a military member, to be on the receiving end of a superior officer-subordinate relationship. Neatly question-begging, their opinion states:

> There is no superior-subordinate relationship between an officer and a civilian in the absence of facts showing that the officer is actually in command of the civilian and that the incident arose out of such command relationship. There can be no question of such relationship . . . here . . . .[89]

Does an overseas commander command the clerks, stenographers, technicians, laborers, and managers who now constitute our Army's civilian work force? If not in peactime, does he in wartime? Are his regulations to be given the same effect on civilians as a body of legislation—an administrative criminal code—as they are vis-a-vis service members? Our military tribunals have not adequately wrestled with these problems.

The closest to a discriminating analysis is to be found in *United States v. King*.[90] After his separation with an undesirable discharge, the accused through a friend at Fort Ord procured a set of what appeared to be valid orders; with them he made his way from California to Germany, pausing for advance travel pay and a partial pay en route. In Germany he continued his pretense to be a solider for a few months by performing duty and receiving pay, but he finally was found out and was charged with and convicted of fradulent enlistment, absence without leave, failure to obey a lawful order, resisting apprehension, forgery, and possession of a false pass. The Court first concluded that King had not accomplished a fraudulent enlistment or constructive enlistment; he was simply a masquerader. This conclusion affected not only the first of the alleged substantive offenses but also negatived the originally asserted basis of court-martial jurisdiction: actual service membership. How could any of the other offenses be sustained? The government countered with an alternate assertion of jurisdiction under article 2(11)—the accused was a civilian accompanying the Army abroad.[91] The offense of fraudulent enlistment failed on the facts and the con-

[88] ACM 12320, Hunt, 22 C.M.R. 814, *pet. denied*, 7 U.S.C.M.A. 789, 22 C.M.R. 331 (1956).

[89] 22 C.M.R. at 819.

[90] 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959).

[91] Obviously, *King* antedated the spawn of Reid v. Covert, 354 U.S. 1 (1957); *see* note 64 *supra*.

victions of forgery had been set aside when the case arrived at the Court of Military Appeals. So, said the Court:

> We need not develop that theory [article 2(11) jurisdiction] for the obvious reason that under our holding the accused is a civilian and, generally speaking, *the crimes involved* [*i.e.*, absence without leave, failure to obey a lawful order, resisting military apprehension, possessing a false pass] *are not chargeable against one in that status.*[92] [Emphasis supplied.]

This statement of holding presupposes that even civilians who may be generally amenable to court-martial jurisdiction are not, in the nature of their connection with the military, capable of committing the purely military offenses,[93] including failure to obey a lawful order. This seems to be eminently sensible, and some such analysis should precede the Court's conclusions should a case like *Mallow* arise again in wartime. The question should be explicitly asked and answered, whether command regulations whose authority depends on command alone may be made the basis for criminal conviction of a civilian employee. At the very least there should be a judicial inquiry into the intimacy of the employee's connection with purely military activities and the relationship of the pertinent exercise of command to the same activities. In some and perhaps most circumstances, even in wartime there should be room for concluding that the civilian "just works here." His mere employment in a command is no basis for subjecting him to the general regulatory powers of the commander *in terms of the punitive (criminal) sanctions.* If his employment is so military in nature that the sole significant distinguishing feature between him and a service member is a uniform, perhaps he should be amenable to military jurisdiction even for purely military offenses.[94] At the other end of the scale is an adventurous stenographer who works in the rear areas of a support command. Subjecting her to court-martial jurisdiction in general need not compel the conclusion that she is commanded by a superior officer who can legislate her personal activities and try her for infractions. Perhaps he should be limited to administrative sanctions for the "offense" of her disobedience, as he is now.

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[92] 11 U.S.C.M.A. at 27, 28 C.M.R. at 251.

[93] Judge Latimer was the author in both *Mallow* and *King*. The former was not cited in the latter.

[94] Perhaps the clearest case is that of a merchant seaman aboard a military transport. Court-martial jurisdiction over such persons under the Articles of War was upheld in *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); and *Ex parte* Gerlach, 247 Fed. 616 (S.D.N.Y. 1917).

3. *Sanctions Against A Dependent.*

For these members of the military community, the sanction of loss of privileges for violating regulatory conditions surrounding the privilege is applicable. In 1963 in Japan, for example, eleven Army dependents had their drivers' licenses (issued by the United States military forces) revoked, and six were denied particular privileges of the post.[95] Even without consideration of the total number of dependents present in the command, this information indicates a proper command emphasis on specific areas of dependents' conduct and effective enforcement by administrative sanctions.

Some administrative sanctions, although nominally addressed to a dependent's sponsor, are designed to be applied for his dependent's misconduct. Obviously the effect on the family as a whole, including the sponsor, is intended to operate as a pressure toward conformity with the community's standards, including the pertinent general regulations. In most overseas areas, government quarters are highly prized; the difference in convenience and expense between living on or off post can be profound. A particularly potent administrative sanction is termination of quarters assignment for violating either regulations governing the proper use of the quarters themselves[96] or regulations preserving order, safety, decorum, and morality on the post generally.[97]

Perhaps the most drastic sanction applicable to dependents of military members if repatriation to the United States. Of the several grounds recited in the regulation[98] permitting[99] repa-

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[95] Letter from Assistant Staff Judge Advocate, Hq. USARJ, to author, 1 Dec. 1964.

[96] *See* Army Reg. No. 210–14, para. 15*a*(7), *b* (4 Oct. 1963).

[97] See JAGA 1963/3647, 8 Feb. 1963, for a discussion of authority and grounds for terminating quarters occupancy for dependent's misconduct not necessarily affecting the quarters themselves.

[98] Joint Travel Regs. for the Uniformed Services, para. 7102 (Change No. 168, 1 Jan. 1967) [hereafter cited as JTR].

[99] *Compare* JTR para. 7102 (Change No. 168, 1 Jan. 1967), which *authorizes* a commander to *authorize* the dependent's travel back to the United States, *with* prior versions such as JTR para. 7009.5 (Change No. 109, 1 Nov. 1961), which purported to *authorize* the overseas commander to *direct* the return of the dependent. The new language is no doubt in recognition of what was always a serious limitation on the power of the commander to apply pressure or actual force to a recalcitrant dependent unimpressed by his orders. Of course there are ways to motivate a dependent to leave even under the present version of the regulations, either through cooperation with the host government, spurs to the sponsor, or isolation of

triation, conduct prejudicial to morale, order, and discipline in the command seems well descriptive of a cavalier disregard of command regulations. The military members of a military community overseas should be spared the example of unrestrained dependents whose conduct, if of a soldier, would result in protracted confinement.

Whatever doubts one has as to a civilian employee's amenability to wartime court-martial jurisdiction and his capacity to commit purely military offenses even if amenable [100] are even more plaguing if one substitutes "dependent" for "employee." However, it is most unlikely that sufficient numbers of dependents will accompany the Army into the field in wartime to create much more than a minor problem of control.

This short review of sanctions applicable to various kinds of members of the military community has emphasized administrative sanctions not just because they are more numerous but because they are efficacious. Indeed, they can and should be the primary means of enforcing general command regulations affecting the personal life and private transactions. Loss of privileges, restriction of patronage of post activities, loss or diminution of status—all these are punishments that fit particularly well the type of misconduct here being considered. Each is a reminder either that a privilege or benefit can be conditional, or that advancement or even retention of status or employment is dependent upon conformity with the lawful expressions of command.

For this reason, the draftsman of a regulation should attempt so to cast its prohibitions that a built-in administrative sanction can be invoked for enforcement. Some examples of attempts that have worked well are:

1. In Okinawa, personnel who marry locally without complying with command regulations are denied important assistances for immigration and valuable types of logistical support.[101]

2. Also in Okinawa, a soldier who procures housing "on the economy" which does not meet prescribed engineering and sanitary standards, or who pays rent in excess of a formula designed

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the dependent from the post and its benefits. It is evident that most sponsors and dependents are unsure of the exact limited operative effect of the present repatriation authority.

[100] See notes 83–94 *supra* and accompanying text.

[101] USARYIS Cir. 600–240, para. 10 (1 Nov. 1961).

to prevent inflationary competition for housing, may be required to reside in his barracks or bachelor quarters on post.[103]

3. In Korea, when military payment certificates are converted to a new series, persons who hold more than prescribed amounts and who cannot satisfactorily demonstrate how they legitimately acquired it will not be permitted to convert the excess.[103]

Imaginative development and use of administrative sanction should be encouraged, not merely because large numbers of courts-martial should be discouraged but to provide flexible, relatively summary, and meaningful means of enforcing what the commander has prescribed.

C. *SPECIAL SITUATIONS WHERE COMMANDERS EXERCISE CIVIL POWERS*

In some important command positions, a commander may be vested with more powers than are his *qua* commander. The Army's interest in training and maintaining on active duty a large number of civil affairs officers attests to the importance of the commander's civil powers. Usually civil powers belong to a commander because he is the senior officer in a geographical area where military exercise of governmental functions is necessary for one reason or another, ordinarily because a campaign is being or has been fought in the area and the local government either cannot function at all or will function only to frustrate our military interests. To say an officer gets these powers because he is the commander is not to say they are command powers in the same sense as in the title of this article. They are civil powers which are his to exercise because, normally, he is the head of the only agency well enough organized and able to function as a government in the immediate arena of battle.

Elsewhere, a military commander may be formally vested with civil powers even amid tranquility and in a viable society. The chief recent instance is in the Ryukyu Islands, which include Okinawa. Our Treaty of Peace with Japan[104] formally contemplates a temporary United States administration of the Ryukyus, among other exotic islands, theoretically to be terminated by a United Nations trusteeship with the United States as trustee. It is more likely that our unilateral administration will continue for

[103] USARYIS Cir. 600–13, para. 9 (8 Jan. 1964).
[103] Hq. Eighth U.S. Army Reg. No. 35–243, para. 5e (9 May 1963).
[104] Art. III, 8 Sept. 1951, [1952] 3 U.S.T. 3169, 3172, T.I.A.S. No. 2490.

an indefinite period because of the islands' strategic importance. By 1957 this condition of our administrative tenure was quite evident, and the President acted to establish mechanics of government in the Ryukyus.[105] At the apex is a High Commissioner, who must be a member of the Armed Forces on active duty[106] and who in practice is always the commanding general of the principal United States Army command in Okinawa. In his capacity as High Commissioner, he may promulgate laws of general application in the Ryukytus [107] just as if enacted by a legislature. Thus, if the High Commissioner-and-commanding general is faced with a vexing social problem, he may attack it by controls internal to his Army command by issuing regulations, or by controls upon the entire populace, or both.

A few years ago, lower level commanders and medical officers began to complain about the availability without prescription of Japanese manufactured patent medicines, the consumption of which seemed to be leading to offenses. Using the drugs caused violence as inhibitions were thereby affected, unauthorized absences and disabilities for performing duty due to after-effects, and hospitalizations caused by overingestion. At first, because the drugs were proper articles for unrestricted sale under the law then obtaining and did have therapeutic value if properly used, an attempt was made to prevent soldiers from using or possessing them by issuing command regulations.[108] This control measure was inadequate for the task; a sensation-seeking soldier was not to be deterred by mere regulations when the source of sensation was so freely available. A few complaints began to be heard that young Ryukyuans were buying and using the drugs for their intoxicating effect only. The High Commissioner decided to change the law itself and issued an ordinance[109] placing the drugs under strict import, prescription, and other controls. A few months later, the command regulations were amended to prohibit possession or use of the drugs defined and listed in the ordinance and implementing civil regulations.[110]

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[105] Exec. Ord. No. 10,713, 5 June 1957, 3 C.F.R. 368 (1954–58 Comp.), *as amended by* Exec. Ord. No. 11,010, 21 March 1962, 3 C.F.R. 587 (1959–63 Comp.).

[106] *Id.* sec. 4(a).

[107] *Id.* sec. 11(a).

[108] USARYIS Cir. 210–10–1 (25 June 1962), with Change 1 (12 Sept. 1962) (superseded by USARYIS Reg. 210–2 (1 April 1963)).

[109] High Commissioner (Ryukyu Islands) Ordinance 51, 3 April 1964.

[110] USARYIS Reg. 210–2 (Change No. 3, 16 Sept. 1964).

This evolution of controls illustrates how the same officer's purely military and civil powers may be mutually supplementary or even overlapping, but they nevertheless are distinct. He may be able to approach a problem in a different way by acting in a different capacity—by "turning his hat around"—but in any specific capacity he can act only as if he held it alone. For instance, as High Commissioner the senior Army officer in Okinawa can promulgate rules governing the conduct of dependents as members of the populace generally. But enforcement is necessarily through the courts of his Civil Administration;[111] court-martial jurisdiction over civilians is not resuscitated.

Turning to a serviceman's relation to dual powers, it is equally apparent that, although a law issued by the High Commissioner may be applicable as the measure of his conduct,[112] he is not triable in a court-martial for violating the general article[113] solely for violating a local law overseas,[114] although the violative conduct might *coincidentally* be an offense against the Uniform Code.[115] With his usual incisiveness, Colonel Winthrop has analyzed the jurisdiction of military commissions vis-a-vis courts-martial to conclude that the former had jurisdiction over our own officers and soldiers whose offenses were not triable under the Articles of War.[116] Although the jurisdiction of a military commission does not rest on the same foundation as that of a regularly established tribunal such as a court of the United States Civil Administration, Ryukyu Islands (or any place else where a military officer exercises civil powers pursuant to a peculiarly civil commission), Colonel Winthrop's analysis illustrates that the

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[111] *See* sec. 10, Exec. Ord. No. 10,713, 5 June 1957, 3 C.F.R. 368 (1954–58 Comp.), *as amended by* Exec. Ord. No. 11,010, 21 March 1962, 3 C.F.R. 587 (1959–63 Comp.).

[112] *See* United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963), where the appellant's argument that the Civil Administration "had no criminal jurisdiction" over him confuses his amenability to local law with the more limited question of his amenability to trial in the Civil Administration courts. *See* sec. 10, Exec. Ord. No. 10,713, 5 June 1957, 3 C.F.R. 368 (1954–58 Comp.), *as amended by* Exec. Order No. 11,010, 21 March 1962, 3 C.F.R. 587 (1959–63 Comp.).

[113] UCMJ art. 134.

[114] ACM 8289, Peterson, 16 C.M.R. 565, *pet. denied*, 4 U.S.C.M.A. 740, 16 C.M.R. 292 (1954); ACM S–5504, Wolverton, 10 C.M.R. 641 (1953); ACM 5636, Hughes, 7 C.M.R. 803, *pet. denied*, 3 U.S.C.M.A. 811, 10 C.M.R. 159 (1953).

[115] ACM S–5504, Wolverton, 10 C.M.R. 641 (1953).

[116] WINTHROP, MILITARY LAW AND PRECEDENTS 838 (2d ed. rev. & enl. 1920 reprint).

Uniform Code and its instrument, the court-martial, constitute a discrete system of law enforcement alongside, and not merged with, other systems under the aegis of the commander.

Consequently, a commander who can exercise both command and civil powers should take care first, to recognize the comparative purviews of his command regulations and civil edits; second, to bring offenders against either type of prohibitive directive before the correct tribunal; and third, to assure that the memmers of his command and residents of his civil jurisdiction are made aware of their particular amenability to his rules and sanctions.

D. *CONSTITUTIONAL LIMITATIONS ON REGULATORY POWERS*

A recent article in the *Military Law Review*[117] reiterates an observation that is becoming increasingly frequent as interest in the constitutional rights of servicemen heightens:[118] constitutional provisions are seldom referred to directly as sources of protected personal freedoms (private rights) in the Armed Forces. In other words, the Constitution itself has not been utilized much as an umbrella sheltering the personal lives and private transactions of soldiers from the regulatory power of their superiors.

The Constitution's limited role has several explanations. First and most obvious is that there is very little in the Constitution that shields any citizen from official interference into his personal affairs. Most of the Bill of Rights preserves to Americans certain important procedural advantages in dealings with the government in criminal cases. The first amendment does impose important restrictions on official inroads into a few personal freedoms, but these freedoms are not typically the subject of command regulations in any event; and even if they are, as shall be seen the first amendment has not been construed by military tribunals to render the affected areas of life's activities absolutely immune even from very extensive regulation.

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[117] Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97, 99 (1964).

[118] *See Hearings on Constitutional Rights of Military Personnel Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962), a document of almost one thousand pages.

Most of life's activities simply are not within any specific constitutional protection by subject matter.[119] Considering legislation to be approximately analogous to issuing regulations for purposes of this discussion, it is clear that if Congress has power to legislate in an area, no citizen has any constitutional immunity from interference in his affairs through congressional exercise of the power just because the interference is considered vexatious. Our reports are filled with cases in which losing litigants in vain sought relief against the operation of statutes which made their blood boil.[120] Their cries that Congress had gone to far have died in the libraries' dust. Even though the due process clause of the fifth amendment operates to bar the enforcement of legislation which is too rank even though it may be within one of the enumerated powers, many cases illustrate the great extent to which private resistance to the exercise of governmental power must give way before the power.

A second reason for the limited role of the Constitution as protector of the personal freedom of servicemen is the extent to which the Uniform Code duplicates by statute the procedural advantages previously referred to. Most obvious is the relationship between article 31 of the Code and the fifth amendment, and between articles 10 and 33 and the sixth amendment. Although such statutory provisions tend to be the resort of the serviceman under charges rather than the constitutional prototypes, it ought to be conceded that the influence of the latter is what made the former such vital elements of our system of military justice. This explanation for the slight impact of the Constitution in preserving the serviceman's personal freedoms in no way denigrates the Constitution, but these procedural ad-

[119] Griswold v. Connecticut, 381 U.S. 479 (1965), holding unconstitutional Connecticut's prohibition against disseminating birth control information to married persons on grounds it violated an inviolate personal right deriving from no explicit constitutional source, has not yet been felt in the area of military regulations. Query, if a military interest in conduct is shown (see part IV *infra*), is *Griswold* apposite? The tenor of *Griswold* is that the conduct in question was none of the state's business. See notes 170–172 *infra* and accompanying text.

[120] *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942), in which the loser is the very archtype of an outraged citizen; United States v. Darby, 312 U.S. 100 (1941), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918), the child labor case; Hamilton v. Ky. Dist. & Whse. Co., 251 U.S. 146 (1919), upholding the War-Time Prohibition Act after the World War I Armistice; United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896), upholding the exercise of eminent domain, under enabling legislation, over the Gettysburg Battlefield in order to turn it into a military park.

vantages have little to do with marking out the boundaries of personal freedom to engage in activities and transactions in any event.

In those few instances in which a constitutional provision has been invoked in an attempt to nullify a command regulation, Army regulation, or personal order, the provision has been held to be less than absolute. This is not surprising in a legal system which is fundamentally free of absolutes. An examination of four cases will illustrate how, in instances of opposition between a purported military power to control personal conduct and a purported constitutional guarantee of freedom to engage in the same kind of conduct, the freedom is what gave way.

The "freedom of religion" clause of the first amendment begins, "Congress shall make no law respecting . . . ." Nevertheless, it surely must follow that all officials—including commanders—should approach the citizens' spiritual life as gingerly as must the Congress. When instruction into the spiritual life has been interposed as an excuse by a military person accused of disobedience, the military tribunals have not passed on the problem as if a commander were utterly free to do what is forbidden to Congress. But, in fact, they have always rejected the proffered excuse as a legally valid defense.

In an Air Force board of review case,[121] the accused, after his voluntary enlistment, came to be persuaded that the Second Commandment forbade his saluting either the flag or an individual because that amounted to practicing idolatry. Several attempts were made by his lay military leaders and an Air Force chaplain to dissuade him from these views, but he persisted in them. The clash of views necessarily came to test fairly soon, when the accused refused to obey an order to "present arms" to the flag at a retreat formation. He was thereupon convicted of willful disobedience in violation of article 90. The board of review affirmed, despite his claim of abridgment of first amendment rights. Its basis was not the complete inapplicability of the first amendment clause to orders; exactly what was the basis is not clear, unless it be simple reliance on precedent.[122] The precedents cited by the

[121] ACM 9036, Morgan, 17 C.M.R. 584 (1954).

[122] Including a caveat in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (in which the actual holding precluded applying sanctions to pressure a civilian school child into performing the flag salute), hinting that the result might be different in the military service; and an administrative opinion, JAGA 1954/4566, 26 May 1954.

board merely observed that there is something about military life which requires due observance of forms like saluting despite subjective reservations, even those inspired by religious persuasion.

A similar case was similarly decided by the same tribunal a few years later.[123] This time, the opinion provided more analysis of command control over religious practice. In addition to citing a rule of substantive law in the *Manual for Courts-Martial* to the effect that it is no defense to disobedience charges that obedience would violate a religious scruple of the accused,[124] the board relied on the well known distinction drawn by Mr. Justice Roberts in *Cantwell v. Connecticut*[125] between the two concepts embodied in first amendment religious freedom: freedom to believe and freedom to act. "[T]he second cannot be [absolute]. Conduct remains subject to regulation for the protection of society."[126] Without disagreeing with his conclusion, one may further distinguish between types of conduct inspired by belief in a set of religious principles, between *action* in violation of the penal law, such as destroying lawful business premises in the belief that the Bible condemns the type of business, and passive *inaction* in the face of a legal duty affirmatively to recognize the political authority by some obeisance.[127] The latter passive conduct, which has been held to be criminal in the military, clearly is not harmful in and of itself. The duty to salute is unquestionably based upon a hierarchy of values and loyalties, and the practice is intended to be a means of attitude control through repetitive symbolic observance. And so, in this author's opinion, the board of review did not punish antisocial conduct for the protection of society so much as it punished an attitude expressed in failing to salute. This is much closer to punishing religious belief itself.

It does not follow that the board's result is wrong. There are unique obligations on servicemen, and one of them is not to opt out of performing a military duty on one's own stand-

[123] ACM 13462, Cupp, 24 C.M.R. 565 (1957).

[124] MCM ¶ 169*b*. Clearly this statement of the law is no longer a rule of decision merely because it appears in the Manual. *Compare* United States v. Smith, 13 U.S.C.M.A. 105,32 C.M.R. 105 (1962), *with* United States v. Smith, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963).

[125] 310 U.S. 296 (1940).

[126] *Id.* at 303–04.

[127] There can also be passive inaction in violation of a penal law, such as failing to file an income tax return, but this is a different type of passivity because of the difference in motive.

ards of selectivity.[128] Fidelity to duty is so fundamentally important an attitude that departures must be punished no matter what the deviant's reasons and no matter that overt expressions of attitude are the only possible formal grounds of punishment. At times this inherent limitation may reward the dissembler who salutes with his fingers crossed.

A claim of command intrusion into religious practices failed to persuade the Court of Military Appeals in *United States v. Wheeler*[129] that the Naval Forces, Philippines, marriage regulations were invalid. The regulations required both the service member and his intended wife to meet with a military chaplain who was supposed to "advise and counsel both parties on the sanctity of marriage, the seriousness of the marriage contract, and, if applicable, the potential difficulties in interracial marriages." Virtually by *ipse dixit*, the majority of the Court decided that such counseling neither promoted nor interfered with an applicant's religious beliefs, required no profession of belief or disbelief, and merely provided a means for a trained counselor to inform the applicant of things he ought to know. Although it may be desirable for persons intending to marry to be counseled rather than to marry in the dark, and although the regulation itself does not require any particular profession of views by the applicant, what the chaplain actually says to his captive advisee could certainly amount to an intrusion into the personal life of the spirit. The advisee, regardless of his views,[130] is required to sit and listen to a spiritual adviser who is fulfilling an official condition to marriage in the command expound on the "sanctity" of marriage, the theological significance of which is the subject of wide disagreement. Without quarreling with the Court's result, one may quarrel with the majority's conclusion that the regulation simply does not invade the area of freedom of religion. It does invade, but the invasion was permitted.

The first amendment guarantee of free speech has fared no better than freedom of religion. Although the well-known case

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[128] CGCMS 21886, Burry, 36 C.M.R. 829 (1966), and NCM 65–1179, Chadwell, 36 C.M.R. 741 (1965), respectively, reject defenses based upon religious opposition to performing duty on the Sabbath and to submitting to required inoculations.

[129] 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

[130] Concededly, many may have formed no views on the spiritual significance of marriage, and many others who have some views may feel that these are the least of concerns in preparing to marry.

of *United States v. Voorhees*[131] can be interpreted to mean that service personnel derive protected private freedoms directly from the Constitution,[132] the actual decision is not very heartening for accused servicemen. The Court upheld Lieutenant Colonel Voorhees's conviction for violating Army regulations by submitting manuscripts to publishers for publication without first obtaining a required departmental clearance. Although the Court construed the regulations rather narrowly in determining what the permitted grounds for refusal of clearance were, they certainly did decide that his manuscript—which dealt with military matters—was subject to prior restraint on publication on grounds of policy and propriety as these affected security of defense information and that he was obligated to submit to the Army's machinery for scrutinizing written matter of this type. The majority members squarely met the first amendment issue of free speech and prior restraint as a particular form of encroachment, deciding that the right of free speech was sufficiently qualified to permit their decision.[133]

So far from absolute are the constitutional protections of whole areas of life's activity, as opposed to procedural restraints upon the government in criminal cases, that it is not surprising that the Constitution plays a minor role in placing personal conduct beyond the reach of command. Indeed, except for cases pertaining to a rule of criminal procedure, no case decided under the Uniform Code has been found in which an instance of disobedience or violation of a command regulation was excused on the sole grounds that the accused was free to act as he did because of the Constitution.

E. *VITALITY OF THE PRESUMPTION THAT A REGULATION IS LEGAL*

"A general order or regulation is presumed to be lawful." [134] So is the personal order of a superior officer or noncommissioned officer, "requiring the performance of a military duty or act," [135] at least according to the Manual. Such a presumption of legality would permeate the entire subject of command

[131] 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).
[132] Murphy, *supra* note 117, at 99.
[133] *See* United States v. Voorhees, 4 U.S.C.M.A. 509, 521, 532, 16 C.M.R. 83, 95, 106 (1954) (opinions of Quinn and Latimer, JJ.).
[134] MCM ¶ 171*a*.
[135] MCM ¶¶ 169*b*, 170*a*, *c*.

authority over the private life. Therefore the questions should now be asked whether there really is any such presumption; if so, of what nature and vitality; whether it plays a role in all cases of violation of command directives or only in some; and how, if at all, it may be overcome.

Perhaps the Court of Military Appeals as presently constituted collectively feels the presumption to be of little significance. In three recent cases in which the legality of orders or regulations was a major issue actually litigated, the issue has been decided without any invocation of or reference to any kind of presumption. In the first case—*United States v. Kauffman*[136]—a Department of the Air Force regulation required members of that service to report in a certain manner any contacts made to them by agents of foreign governments. Captain Kauffman, after such a contact so bizarre as to be reminiscent of a plot out of John Buchan, made no reports at all. Without expressly relying on any presumption, the Court concluded that the regulation was valid as a security measure and that, as it applied to one whose relationships with foreign agents might be a substantive offense, it was not invalid because it might impinge upon the privilege against self-incrimination.

Next, in *United States v. Giordano*,[137] a regulation issued by the Commanding General, Fort Hood, Texas, limiting the interest one service member could charge upon a loan to another was held to be valid and enforceable.[138]

Third, in *United States v. Aycock*,[139] the same Court held invalid a unit commander's order to the accused (who was at the time accused of committing adultery with Mrs. D., the wife of a fellow airman) not to contact or talk about the adultery case with either Mrs. D. or her husband. This order, although properly motivated as a measure to preclude harrassment of the D. family pending the accused's trial, would also inherently and improperly hinder and embarrass the accused in preparing his defense.

If the Court of Military Appeals has not considered the Manual's presumption of legality sufficiently influential to merit

[136] 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).
[137] 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).
[138] The regulation was quite obviously an effect of the decision in United States v. Day, 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960).
[139] 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964).

even an allusive discussion in any of these three cases, in each of which the Manual's rule would by its terms apply (a general regulation involving a strictly military duty, a general regulation limiting freedom of property transactions in the interests of morale and discipline, and a personal order concerning an official matter), is the presumption any longer vital? Or, will the appellate tribunals which ultimately establish the limits of legality simply confine their analysis to the legality of a command directive on its face and the application of extrinsic facts in the record tending to show illegality? In this author's opinion, the presumption of legality is a vital rule in some kinds of cases and retains a role in our law, albeit limited.

This role is understandable only when one recalls that the pertinent punitive articles[140] themselves denounce disobedience only of lawful orders or lawful regulations. Lawfulness is an element of each such offense—something that must affirmatively be proved or otherwise established in some manner. Seldom does the prosecution introduce evidence tending to prove legality.[141] Rather, it is ordinarily assumed that the words and purport of the order or regulation itself, as construed by a court-martial composed of persons seasoned in military service, demonstrate a sufficient connection with a military practice or function. In other words, there may be a justifiable inference of legality deducible from the nature of the order itself.[142] This is merely an application of rough logic and experience by the finders of fact.

The presumption of legality, however, is more than a mere inference that *may* be drawn. A conclusion that the order is lawful *must* be drawn,[143] unless its illegality is apparent on its face[144] or is apparent from the government's own evi-

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[140] UCMJ arts. 90–92.

[141] At least not in the author's experience and conclusions drawn from the cases cited in parts III & IV *infra*.

[142] In NCM 65–1179, Chadwell, 36 C.M.R. 741 (1965), an order to submit to inoculations against communicable diseases was said to be legal on its face.

[143] *See* note 147 *infra* and accompanying text.

[144] Because it does not relate to a military duty, United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); or is too broad, United States v. Wilson, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); or is an unreasonable (as judicially determined) means of regulating conduct which might properly be regulated by other means. *Compare* United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958) *with* United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

dence,[145] or is shown by the defense.[146] If the order may or may not be legal depending on extrinsic facts, it will be held to be legal in the absence of any facts in the record tending to show illegality.[147]

So it may be concluded that in no case need the prosecution make an evidentiary showing of legality in its case in chief. If the regulation in issue is illegal on its face, prosecution evidence is futile and the presumption, which is addressed to fact-finders and not to law determiners, never comes into play. If it is not illegal on its face, there must be a showing of illegality in order for the defense to prevail upon the issue.[148] If the government's own evidence supplies this showing to such an extent that legality cannot be found beyond a reasonable doubt that the order is lawful,[149] the presumption never comes into play. The difficult and virtually unanswered question is: Of what effect is the presumption in a case where there is before the court some evidence of illegality but not so persuasive that a finding of guilty is precluded? A corollary question is: Who bears the burden of proof on the issue of legality?

Simply saying that the accused bears the burden of proving illegality because of the presumption[150] is too gross an analysis. It can scarcely be submitted that an accused ever bears the ultimate burden of proof,[151] although he may at times have to get evidence before the court (if it has not come in during the prosecution's case) on his own initiative in order to pose or raise an issue favorable to him. In these instances of what is usually called "bearing the burden of going forward with the evidence," the posture of the case is simply such that the accused has to get his own issues into the case if they are to be raised at all; no one else can be expected to do it for him. Other examples are the issues of insanity,[152]

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[145] *See* United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).
[146] *See* ACM 12539, Kapla, 22 C.M.R. 825 (1956).
[147] United States v. Fidler, 12 U.S.C.M.A. 454, 31 C.M.R. 40 (1961), in which the author judge, Ferguson, J., applied the presumption of legality without saying so.
[148] United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956); ACM 12539, Kapla, 22 C.M.R. 825 (1956); *cf.* United States v. Coombs, 8 U.S.C.M.A. 749, 25 C.M.R. 253 (1958).
[149] *See* United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).
[150] *See* United States v. Trani, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952); ACM 12539, Kapla, 22 C.M.R. 825 (1956).
[151] *See* UCMJ art. 51*e*(4); notes 21 & 22 *supra* and accompanying text.
[152] *See* United States v. Carey, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960).

affirmative defenses,[153] some lesser included offenses,[154] and the propriety of possession of narcotics.[155] Once the issue is joined, the prosecution must persuade the fact-finders to the requisite degree of conviction—proof beyond a reasonable doubt.

When an issue of an order's or regulation's illegality is factually injected into a case,[156] what should happen to the presumption of legality? It should, in this author's opinion, melt away before the heat of contrary evidence, for its role has been played out by forcing the defense to introduce such evidence if the issue of legality is to be litigated.[157] Thereafter, only the evidence itself, including whatever inferences either way may be drawn from the very subject matter of the order, should be the basis for the fact-finders' decision.

Persons who draft and promulgate regulations should be particularly well aware of the limited role and potency of the presumption of legality. It does not render regulations lawful; it should not be relied upon by draftsmen. It is significant only at trial and then, in summary, only if no evidence at all has been introduced on the issue[158] (in which event it is dispositive), or only to the extent it imposes upon the defense a burden of going forward with evidence. If the defense does so, there may as well never have been such a presumption.

III. THE GENERAL MEASURE OF A REGULATION'S LEGALITY

A broad discussion of the approaches to resolving the question of a regulation's legality should precede specific discus-

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[153] *See, e.g.*, United States v. Amie, 7 U.S.C.M.A. 514, 22 C.M.R. 304 (1957) (physical incapacity); United States v. Backley, 2 U.S.C.M.A. 496, 9 C.M.R. 126 (1953) (intoxication).

[154] *See* United States v. Horton, 9 U.S.C.M.A. 469, 26 C.M.R. 249 (1958); United States v. Snyder, 6 U.S.C.M.A. 692, 21 C.M.R. 14 (1956).

[155] *See* United States v. Fears, 11 U.S.C.M.A. 584, 29 C.M.R. 400 (1960).

[156] Assuming, in such a case, the directive is not illegal on its face.

[157] *Cf.* Otney v. United States, 340 F. 2d 696 (10th Cir. 1965); United States v. Oakley, 11 U.S.C.M.A. 187, 29 C.M.R. 3 (1960), and United States v. Henderson, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960), which illustrate, to this author at least, the futility of talk of a presumption of sanity in a case where the issue is actually being fought out. Note how much had to be read into an instructional reference to the presumption of sanity in order to sustain the conviction in United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954). *But cf.* CM 413999, Higgins, 10 October 1966, 66–28 JALS 12.

[158] *See* notes 147 & 156 *supra* and accompanying text.

sions about particular types of regulations and possible factual justifications or bases of legality. In the hierarchical military society, there are inevitably going to be two views about regulations held respectively by a commander and by his subordinates, particularly the lower ranking ones. These views tend to freeze into legal approaches urged by trial and defense counsel—approaches to making up formulae for measuring legality. The approach from the commander's end will tend to emphasize his powers; that from the troops end will tend to emphasize what they consider to be their rights.

If the commander and the subordinates are reasonable and possessed of a dash of good will, neither's view will be absolute. On the one hand it is seldom urged that command regulations may control every facet of the personal life under any and all circumstances, nor on the other that any activity typically felt to be essentially personal in civilian life is completely immune from control. But it is precisely in the application of conditional, qualified standards that the troublesome cases arise. An emphasis on the importance of either the powers or the rights in opposition to the other decides the case.

The "powers" approach recognizes that, to be lawful, a regulation must pertain to a military interest in some respect, but it implies that the permissible limits of control are overreached only when this intrinsic condition is not present. A regulation will fail, not because it bumps up against any specifically protected personal rights, but because the command powers simply do not extend far enough in the first instance. To use a homely analogy, it is as if one failed to fill the inside of a large bottle by blowing up a balloon in it, not because the bottle was partially filled with any resistant substance but because the balloon was not large enough.

The "rights" approach presupposes that certain areas of life's activities are, in their very natures, not properly subject to command control, no matter how the commander attempts to verbalize a connection between the activities and the truly military interests of his command. To use another analogy, it is as if these activities lay behind a slightly moveable but sturdy, invisible shield such as we formerly saw in toothpaste advertisements. Because this approach is in some respects the more specific of the two, it will be discussed first.

A. *A THEORY OF INVIOLABLE PERSONAL RIGHTS—A CRITIQUE*

A most eloquent affirmation of a soldier's individual dignity was made by Chief Judge Quinn in his concurring opinion in *United States v. Milldebrandt.*[159]

> Persons in the military service are neither puppets nor robots. They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial and punishment by court-martial is concerned. In that area they are human beings endowed with *legal and personal rights which are not subject to military order.* [Emphasis supplied.] Congress left no room for doubt about that. It did not say that the violation of *any* order was punishable by court-martial, but only that the violation of a *lawful* order was.[160] [Italics in original.]

Almost all cases whose actual holdings seem to support a theory of inviolable rights are prosecutions for disobedience of personal orders and not violations of general regulations, but the Court of Military Appeals has not differentiated the two offenses in considering the issue of legality.[161] The reasonable conclusion is that a general regulation is unlawful if, according to the authorities, a substantially identical personal order would be unlawful.

Two groups of cases clearly establish soldiers' rights which are immune from command intrusion. The first group preserves those rights of an accused in a criminal case previously called "procedural advantages." No military superior will be permitted by outright force of orders to require the accused to incriminate himself[162] or to impede the accused in the exercise of his rights to prepare and present a defense.[163]

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[159] 8 U.S.C.M.A. 635, 639, 25 C.M.R. 139, 143 (1958).

[160] But in the very next paragraph, Chief Judge Quinn actually espouses the "power" approach as it has been described in the introductory paragraphs of this part.

[161] *See, e.g.*, the citations in the second paragraph of the opinion of the Court in United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961). Each cited case involved disobedience of a personal order; the *Wheeler* case itself involved a general regulation.

[162] *See* United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958) (but note that the rationale of the case sounds of the "powers" approach: that there is no military duty to produce self-incriminating evidence, so such activities are beyond the reach of command); United States v. Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957); United States v. Greer, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953). *But see* United States v. Kauffman, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963), and United States v. Smith, 9 U.S.C.M.A. 240, 26 C.M.R. 20 (1958), in which regulations were held legal notwithstanding their possible impingement upon the privilege against self-incrimination.

[163] United States v. Aycock, 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964).

The second group of cases merely precludes a commander from giving an order which would overrule a statute or higher level regulation which *in effect* extends a specific right to an individual serviceman; "in effect," because the higher level regulation may in terms be addressed to the commander to limit his actions; but to the extent he is bound, his subordinates are beyond his reach. Thus a serviceman may derive positive rights from a high level regulation as against a lower level regulation.[164] Or, a statute enacted for his protection may be interposed in bar of an exercise of command.[165]

All cases in these two groups have a fundamental feature in common. The protected personal right is specific and has a definite source. Therefore, the cases are of limited significance and certainly cannot be used as premises for any broad generalization that private rights are beyond the reach of command because they are private, or that one's personal activities are simply no concern of his military superiors.

Of greater importance in urging a "rights" approach are *United States v. Wilson*[166] and *United States v. Milldebrandt*.[167] In the former, the accused was given a personal order "not to drink liquor." His conviction was set aside, not because he could point to any statutory or regulatory right to drink but because the order was held to be inherently invalid. It certainly had the virtue of simplicity but this was also its fatal vice; it was too broad. Can it be concluded from *Wilson* that there is a protected private right to imbibe? Not in this author's opinion; the Court did not conclude that the conduct by its nature *could* not be related to military duty but only that it *had* not been so related:

> *In the absence of circumstances tending to show its connection to military needs,* an order which is so broadly restrictive of a private right of an individual is arbitrary and illegal. [Citing *United States v. Wysong,* 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).][168] [Emphasis supplied.]

In *Milldebrandt* a heavily indebted accused was placed on leave so he could put his affairs in order, if possible. Prior to his departure he was ordered to report to his commander "con-

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[164] *See* United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954), and note 9 *supra.*

[165] *See* United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

[166] 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961).

[167] 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

[168] 12 U.S.C.M.A. at 166–67, 30 C.M.R. at 166–67.

cerning his indebtedness" from time to time during the leave. The Court held the order to be illegal for several reasons: It was so broad its relation to military duty could not be shown; a literal application could violate the privilege against self-incrimination; and a commander cannot so subject a person on leave to an order so little related to purely military duties. Perhaps any of these reasons would hve sufficed for the Court's decision but the last received the most emphasis. By no means does the case support a proposition that there is an inviolable right to absolute privacy in the conduct of one's own financial affairs. Even the accused expressly declined to take so extreme a position. It seems, except for its self-incrimination aspect which may truly encompass a protected right, the case was decided by the "power" approach. Without regard to any affirmative claim by the accused that his personal life was being invaded, the commander (and later the prosecutor) was unable to make the necessary showing that his order pertained to a military duty of such magnitude that it could control the accused while on leave.

A general regulation governing marriage of naval persons in the Philippines was before the Court of Military Appeals in *United States v. Nation*.[169] It was held to be invalid not because the subject matter was too personal to be within the regulatory power but because the power was not properly exercised. The commander had established an unreasonable and arbitrary period of mandatory delay between the submission of an application for permission to marry and the marriage itself. The naked issue of an accused's right to marry without any preliminaries prescribed by command was not discussed.

After the *Nation* decision, the naval commander revised his regulations to expunge the objectionable, arbitrary portions. In *United States v. Wheeler*[170] the revised version was also attacked as an illegal infringement on private rights. This time the regulations were held to be proper and legal.[171] Only the dissenter—Judge Ferguson—would have applied a "rights" approach in evaluating the regulation for legality.[172] Reading a bit into his opinion, one concludes that in his view a commander is barred from controlling the preliminaries to an over-

[169] 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

[170] 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

[171] And were again in United States v. Smith, 12 U.S.C.M.A. 564, 31 C.M.R. 150 (1961), after Judge Kilday's appointment to the Court.

[172] *See* 12 U.S.C.M.A. at 390, 30 C.M.R. at 390. The principal opinion recognizes the commander's powers to regulate the subject.

seas marriage (counseling, background investigations and the like) because of the personal nature of marriage and not because of an absence of any relation between marriage and military interests.

From the cases cited and summarized in this section, both a positive and a negative generalization can be drawn. First, there are protected rights immune from command encroachment or interference, but only to the extent they are to be found in specific provisions of law or higher level regulations. Second, other personal activities and interests are not beyond the reach of command control because of their basic nature but, if at all, because a persuasive showing of connection between them and military interests cannot or has not been made.

B. *A THEORY OF LIMITED COMMANDER'S POWERS*

United States v. Martin,[173] decided in 1952, is a principal reference point in all the cases analyzed in this chapter. There, a Navy enlisted man who was observed to have a large amount of cigarettes as he prepared to take liberty in a foreign port was ordered not to use them for barter. A unanimous Court held the order to be legal (but reversed for insufficiency of evidence) on the grounds that the accused's rights in his property were properly subject to command control because what he intended to do with it affected military interests. In general, these interests were said to be the morale, discipline, and usefulness of the members of a command and activities directly connected with the maintenance of good order in the service.

If an order or regulation can be shown to relate to one of these military interests, it is not invalid because it necessarily results in the extinguishment or subordination of a private interest.[174] Members of a command are not at the mercy of a despotic, unreasonable commander, however, because if the relationship between the activity and military interest is not shown in the first place,[175] or if the regulatory means of protecting the military interests are arbitrary because not reasonably calculated to accomplish this legitimate end,[176] or if

[173] 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952).

[174] *See id.* at 676, 5 C.M.R. at 104 (1952); United States v. Giordano, 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964); United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961); ACM S-6846, Barnes, 12 C.M.R. 735, *pet. denied*, 3 U.S.C.M.A. 835, 12 C.M.R. 204 (1953).

[175] *See* United States v. Milldebrandt, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

[176] *See* United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

a tenuous but possibly supportable connection between private conduct and military interests is smothered by an order far too broad,[177] the exercise of command is not lawful.

Now it must be conceded that many cases would be decided the same way whether one held that a commander's sword (his powers) was too short or a subordinate's shield (his private rights) too strong. Nevertheless, the distinction is significant if the sword telescopes depending on specific circumstances, particularly if there is anything about being overseas that extends a commander's powers either by enlarging the range of military interests which private activities may be held to affect or by extending military control over conduct which is normally regulated by civilian authorities in the United States. The next part will demonstrate that this is what happens.

IV. SPECIFIC JUSTIFICATIONS FOR REGULATING THE PERSONAL LIFE

The frequently reiterated description of military interests which may be invoked in support of the power to issue orders and regulations includes only the "morale, discipline, good order, and usefulness of the command."[178] These are too broad to be practical instruments of analysis. The many cases and opinions in which a regulation has been in issue may be categorized into more, but more specific, interests. These may be thought of as recognized justifications for command regulations. Some are pertinent to internal controls, some to controls of relationships between members of the military community and the surrounding civilian community (or local government), and some to both. The following sections of this part isolate and examine some specific interests (justifications) which have expressly been advanced in support of or implicitly underlie the kinds of regulations which have come into litigation in military tribunals since the enactment of the Uniform Code. Obviously the list is not exclusive because of the very breadth of the orthodox formula which commences this paragraph, but it is reasonably complete as derived from the cases decided since 1951.

[177] *See* United States v. Wilson, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

[178] *See* United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961); United States v. Wilson, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Milldebrandt, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958) (concurring opinion of Quinn, C.J.); United States v. Martin, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952).

A. *SAFETY, SECURITY, AND WELL-BEING*

The simplest cases are also the most numerous: those in which the regulations are straightforward endeavors to preserve health, promote safety, preserve tranquillity, and protect security. A fairly direct relationship between personal conduct and these military interests is evident. However, some of the regulations do raise problems as to the permissible extent of command control even though the general amenability of the type of conduct to some degree of control is not seriously questioned.

The most elementary regulations are those which control the possession or use of instruments or substances dangerous to the person. Many cases have affirmed conviction for violating firearms registration procedures,[179] or simply carrying [180] or possessing [181] firearms in violation of express prohibitions, or carrying knives of certain descriptions.[182] In all these cases, the legality of the pertinent controls was assumed without question or discussion. In those which arose overseas, no distinction has been advanced between conduct on and off post.

Although possessing or using narcotics or marihuana is a specifically recognized offense in violation of article 134,[183] it has very reasonably been held that possessing instruments for their administration into the body is not.[184] But, without any attacks upon the regulation's legality, the Court of Military Appeals has many times affirmed convictions for violating the old Far East Command's specific prohibition of such possession.[185] This prohibition has been carried over into successor Army commands in Japan and Okinawa.[186]

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[179] ACM 4965, Bates, 5 C.M.R. 711, *pet. denied*, 2 U.S.C.M.A. 674, 5 C.M.R. 130 (1952).

[180] *See* United States v. Sandoval, 4 U.S.C.M.A. 61, 15 C.M.R. 61 (1954).

[181] *See* United States v. Wade, 1 U.S.C.M.A. 459, 4 C.M.R. 51 (1952) (case arose in a California Marine base); ACM S–3544, Waddell, 6 C.M.R. 703 (1952) (case arose at a New York Air Force base).

[182] *See* United States v. Lowe, 4 U.S.C.M.A. 654, 16 C.M.R. 228 (1954); CM 363388, McGovern, 10 C.M.R. 391 (1953); CM 354973, Broussard, 6 C.M.R. 168 (1952). In each of these, footnote 5, Table of Maximum Punishments, MCM ¶ 127*c*, was held to limit the permissible punishment to that prescribed for carrying a concealed weapon.

[183] *See* MCM ¶ 213; United States v. Griggs, 13 U.S.C.M.A. 57, 32 C.M.R. 57 (1962).

[184] CGCM 9813, Lefort, 15 C.M.R. 596 (1954).

[185] *E.g.*, United States v. Meadows, 7 U.S.C.M.A. 52, 21 C.M.R. 178 (1956); United States v. Berry, 2 U.S.C.M.A. 374, 9 C.M.R. 4 (1953); United States v. Gohagen, 2 U.S.C.M.A. 175, 7 C.M.R. 51 (1953).

[186] USARJ Reg. 190–2, para. 5 (11 Dec. 1963); USARYIS Reg. 210–2, para. 8a(1) (Change No. 3, 16 Sept. 1964).

To meet a special problem, these same two commands have also published special prohibitions against the possession or use of drugs which, although not narcotics,[187] affect the nervous system deleteriously. Prior to April 3, 1964,[188] these drugs were available without prescription in the Ryukyus; apparently they still are in Japan. In the former command, court-martial records of trial, hospital records, and line of duty investigations all reflected a high incidence of antisocial acts and harmful physical consequences directly attributable to the drugs, particularly one sold under the trade name "Doloran." Presumably the same data were noted in Japan. Was it proper for these two authorities to deny to soldiers a substance freely and lawfully available to local civilians? In this author's opinion, the answer is clearly "yes" if the drugs actually were adversely affecting the command's readiness and efficiency. No case in which a regulation governing an instrument (except an automobile) or substance affecting health or safety has been in issue even hints that command control is in any way limited by the extent of local civilian control. Indeed, lacunae in civilian controls are sometimes a factor tending to render a regulation legitimate, as will be seen.[189]

A good-sized body of law has grown up about command regulations governing that most dangerous of instruments: the automobile. Much of it pertains to the extent to which commanders can control their subordinates' off-post activities with automobiles.[190] This issue will be examined in sections F and G of this part. For the present, our concern is the types of controls over automobiles that may be imposed and not the geographic areas in which they may be operative.

Various boards of review have assumed the validity of regulations requiring liability insurance as a condition of operating motor vehicles overseas;[191] prohibiting the operation

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[187] *Id.* (The USARYIS regulations superseded substantially similar provisions in USARYIS Cir. 210–10–1 (25 June 1962).)

[188] When High Commissioner Ordinance No. 51 was promulgated.

[189] See section G *infra*.

[190] Questions as to a commander's control of automobiles off post are common in administrative opinions but strangely absent in judicial opinions. *See* JAGA 1958/5147, 10 July 1958, 8 DIG. OPS. 225 (1959); JAGA 1956/8214, 9 Nov. 1956, 7 DIG. OPS. 275 (1958); Op. JAGAF 1956/21, 26 Sept. 1956, 6 DIG. OPS. 388 (1957), for examples of opinions which confine the commander's authority over automobiles to the limits of the post. *Compare* ACM 13683, Borrero, 24 C.M.R. 754, *pet. denied*, 8 U.S.C.M.A. 774, 24 C.M.R. 311 (1957); ACM 9450, Boone, 18 C.M.R. 572 (1954).

of a government vehicle after drinking any alcoholic beverages on the same day;[192] and actually prescribing rules of the road.[193] The Court of Military Appeals has held lawful a requirement applicable throughout Europe that drivers involved in certain kinds of accidents submit prompt reports to United States officials.[194] Even more sweeping regulations whose legality has been assumed prohibit driving without an operator's license granted or recognized by military authority,[195] or without first having registered the personal vehicle with military authority.[196]

It must be admitted, it seems, that community attitudes (particularly those of the persons being regulated) differ when the subject of regulation is switch-blade knives as contrasted to automobiles. Few voices are raised in defense of a personal right to carry an alley-fighter's dangerous weapon even though it may never be used in an illegal way. The weapon has an aura of disrepute. In contrast, an automobile may be a recognized symbol of utterly desirable personal characteristics such as manliness, affluence, explorative interests, and the like; it may be the object of the owner's deepest, most intense affection. Which is the more dangerous instrument? One can at least put up a strong argument in favor of the automobile. We can detect, therefore, a resistance to regulation in proportion to the respectability and social utility of the subject matter, and not simply to the manner in which its misuse is dangerous to individual soldiers and those around him. Probably this resistance is the reason the power of a commander over his subordinate's automobiles is so frequently the subject of ad-

[192] ACM 9450, Boone, 18 C.M.R. 572 (1954).

[193] CM 351163, Day, 4 C.M.R. 278 (1952).

[194] CM 406494, Hannah, 31 C.M.R. 360 (1961); CM 365803, Parker, 12 C.M.R. 213, *pet. denied*, 3 U.S.C.M.A. 836, 13 C.M.R. 142 (1953). Whether this type of regulation can be made effective off post will be discussed in section G *infra*. The *Hannah* case arose at Fort Dix, New Jersey; *Parker* at Fort Bragg, North Carolina.

[195] United States v. Smith, 9 U.S.C.M.A. 240, 26 C.M.R. 20 (1958). The regulation was justified not only at a reasonable traffic safety measure per se but as a specific implementation of an international agreement. See section F *infra*. *Smith* is the only case since enactment of the Uniform Code in which the legality of a traffic control regulation has specifically been litigated. In all other cases, the issue of legality has received no attention.

[196] United States v. Bridges, 12 U.S.C.M.A. 96, 30 C.M.R. 96 (1961); United States v. Statham, 9 U.S.C.M.A. 200, 25 C.M.R. 462 (1958); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

[196] United States v. Statham, 9 U.S.C.M.A. 200, 25 C.M.R. 462 (1958); United States v. Green, 7 U.S.C.M.A. 539, 23 C.M.R. 3 (1957).

ministrative opinions.[197] Curiously, in contrast to the many limitations and distinctions set out in that kind of opinion,[198] no judicial opinion from any board of review or the Court of Military Appeals has ever cast doubt on the legality of any motor vehicle regulation brought before it.[199]

If, as seems to be the case, controls over motor vehicles are lawful exercises of command, it should follow that commanders may control the distances their subordinates may travel while on pass. The dangers attendant to a trip too long and arduous for the time available are apparent, even if the automobile is in good condition and the driver well qualified. And, even if the person on pass does not drive but uses public transportation, his commander may reasonably be apprehensive that a long trip entails too great a risk of delayed return. Both times "maximum radius of pass" regulations have been applied in recent years by boards of review, their legality has been assumed.[200]

The obvious motive for issuing a radius-of-pass regulation, particularly as applied to a person driving his own automobile, is to save him from himself—to remove a temptation to go too far. The same protectionism is apparent in the typical curfew

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[197] As evidenced by almost any volume of DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL.

[198] As recently as 1962, an opinion was rendered that a post commander in the United States could not require seat belts as a condition of registration on post because they were not "necessary for the safety of the average driver." JAGA 1962/4381, 9 Aug. 1962 (an opinion no longer followed; *see* JAGA 1966/4123, 18 July 1966). But, less than two years later, Headquarters, European Command was informed that such a requirement might be justified in Europe because:

1. It is necessary that all troops promptly respond to threats to our security.
2. Every reasonable effort should be made to insure the protection and safety of local inhabitants.
3. Many public roads in Europe are not covered by speed limits.
4. Accidents resulting in serious injury may be more frequent in Europe.

Part of this opinion (JAGA 1963/5017, 21 Jan. 1964) thus demonstrates how conditions overseas may tend to connect personal activities with military interests. The other part—treating the extent to which the host country's sovereignty affects our power to regulate private automobiles—should be read in light of the materials cited in section G *infra*.

[199] *Compare* the regulation appearing in ACM 9450, Boone, 18 C.M.R. 572 (1954), *with* Op. JAGAF 1951/126, 22 Oct. 1951, 1 DIG. OPS. 415 (1952).

[200] CGCMS 20326, Klingler, 21 C.M.R. 608 (1956); ACM S–9686, Fraser, 17 C.M.R. 790 (1954). Klingler's conviction was set aside on the grounds that the order applied only to persons on liberty, and he may have been absent without leave when he exceeded the distance limits. Both these cases arose in the United States.

and off limits regulations. Although curfew may be viewed as a means of assuming a bright group at reville, all refreshed from an adequate night's sleep, it is generally acknowledged that clearing the streets and bars before the witching hours reduces the incidence of fractures, alcoholic poisoning, loathsome disease, and the other wages of late carousing. Off limits rules have the same effect[201] but are related to place not time. The validity of such measures has often been assumed.[202]

A regulation with a similar prohibitive effect but promulgated for entirely different reasons was, by necessary implication, held to be legal in *United States v. Porter*.[203] There a Fort Huachuca, Arizona, post regulation forbade going into Mexico on pass without first obtaining special permission duly documented.[204] The principal opinion stated that the reasons for such restrictions are patent but failed to specify any particular one. Two obvious reasons do come to mind. First, a soldier may have demonstrated a faculty for getting into trouble with the police, and the consequences may be much more extreme in Naco, Mexico, than in Tombstone, Arizona. Second, an habitual absentee may properly be precluded from journeying beyond the reach of United States law enforcement, for the temptation to desert may there be too great.[205]

Porter contrasts interestingly with the earlier United States Supreme Court cases, *Kent v. Dulles*[206] and *Dayton v. Dulles*,[207] in which an American citizen's right to travel abroad without impediments based upon political beliefs or association was

[201] And may also be an economic protection for American innocents abroad. See section C *infra*.

[202] CM 393499, Jones, 23 C.M.R. 444 (1957); CM 375241, Williams, 17 C.M.R. 403 (1954); CM 367978, Bruce, 14 C.M.R. 260 (1953), *pet. denied*, 4 U.S.C.M.A. 718, 14 C.M.R. 228 (1954); ACM S-7959, Sanders, 14 C.M.R. 889 (1954). In *Jones*, the regulation put all of Korea off limits. Consequently, the punishment for violation was limited to that prescribed for breach of restriction.

[203] 11 U.S.C.M.A. 170, 28 C.M.R. 394 (1960).

[204] *Porter* is a significant case in another respect: implementation of statutes or higher level regulations as a justification for command regulations. See section E *infra*.

[205] If the foreign country is belligerently unfriendly, a third reason is to preclude defection, or apprehension and intelligence interrogation of the traveler. *See* Hq. Seventh U.S. Army Reg. No. 632-50 (21 Aug. 1964), which even prohibits (with exceptions) travel within five kilometers of the East German and Czechoslovakian borders so there will be no inadvertent border crossings. *See also* ACM 17410, Northrup, 31 C.M.R. 599 (1961), *pet. denied*, 12 U.S.C.M.A. 758, 31 C.M.R. 314 (1962).

[206] 357 U.S. 116 (1958).

[207] 357 U.S. 144 (1958).

resoundingly vindicated.[208] Neither of these was cited in *Porter*. Apparently the Court of Military Appeals believed it was axiomatic that a civilian citizen's freedom to travel is simply not carried over into the military because of the very nature of military life.

Freedom of association was much curtailed by the regulations held legal in *United States v. Kauffman*,[209] which required members of the Air Force to report contacts made to them by foreign agents. This was issued at Department headquarters, but nothing suggests that similar provisions promulgated by an overseas command as a local security measure would not be equally valid. Obviously the regulation contemplated reports by loyal airmen, but it is every bit as much violated by one who intentionally consorts with a known spy. No one in this latter situation is going to make a report; it is an indirect but effective countermeasure against the association itself. The loyal airman who is infatuated with a latter-day Mata Hari, but tells her nothing for all her importunings, either reports these and promptly finds his association at an end, or is subject to criminal conviction for, in effect, continuing the association. If a civilian, he might find himself the subject of unpleasant official scrutiny, but not a criminal.

Curtailments upon freedom of association bring to mind the cases on command regulations governing marriage overseas, discussed in the last part.[210] Army Regulation Number 600–240 [211] sets forth a pattern of provisions followed fairly closely in the various overseas command regulations.[212] The serviceman husband-to-be is supposed to submit a large amount of information in support of his application to marry, so that the background of his future wife can be investigated to ascertain whether she will probably be admitted to the United States. Then the two of them are expected to receive counseling from his commander, a judge advocate, and a chaplain. They have to take and pass a medical examination. After all these preliminaries, some designated authority will either approve or dis-

[208] By five of the Justices. *See* the prophetic article, Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853 (1954).
[209] 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).
[210] See notes 169–172 *supra* and accompanying text.
[211] 17 Dec. 1965.
[212] USARYIS Cir. 600–240 (1 Nov. 1961) and USAREUR Reg. 608–61 (10 July 1963) are typical.

approve the application.[213] The regulations expressly or by necessary implication prohibit marriage without first obtaining approval.

No matter how one suspects that officialdom's motive for the regulations is arrant paternalism,[214] the conventional justifications are that the military community overseas should be protected from diseased brides[215] and security risks.[216] In the cases holding such regulations lawful and enforceable,[217] no distinction has yet been made between the criminality of marrying without first complying with any of the preliminary requirements—in other words, simply ignoring the regulation—and marrying after fully complying but suffering an actual disapproval of the application. The decided cases all seem to be of the former sort, and it is well known administrative practice, encouraged by departmental regulations,[218] to approve rather than disapprove. Nevertheless one wonders what would be the appellate treatment of a conviction for marrying in disregard of an express disapproval of a fully completed application by a soldier who has faithfully followed every prescribed step, if the disapproval was not based upon a legal impediment to marriage eligibility under the controlling local law. May the commander, in sheer exercise of discretion, prohibit marriage as opposed to prescribing conditions precedent? If the military interests of health and security that justify the regulations are truly to be protected, simply enforcing adherence to premarital procedures will not suffice. In a gratuitous discussion[219] of this aspect of the offense, an Army board of review[220] concluded that disapproval itself, if not arbitrary, is judicially enforceable; after all, the marriage need only be postponed, because the soldier need not forever be subject to his current command.

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[213] Although disapproval is supposed to be limited to narrow and specific grounds, such as a legal impediment to marriage or probable inability of the spouse to be admitted to the United States, it remains a possibility.

[214] *See* United States v. Wheeler, 12 U.S.C.M.A. 387, 392, 30 C.M.R. 387, 392 (1961) (dissenting opinion of Ferguson, J.).

[215] *Id.* at 390, 30 C.M.R. at 390 (1961) (opinion of the Court).

[216] *See* CM 403928, Jordan, 30 C.M.R. 424, 429, *pet. denied*, 12 U.S.C.M.A. 727, 30 C.M.R. 417 (1960).

[217] United States v. Smith, 12 U.S.C.M.A. 564, 31 C.M.R. 150 (1961); United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961); CM 403928, Jordan, 30 C.M.R. 424 (1960). *Compare* the regulations held to be unlawful in United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

[218] *See* Army Reg. No. 600–240 (17 Dec. 1965).

[219] Because the accused apparently did not bother to comply at all.

[220] CM 403928, Jordan, 30 C.M.R. 424, 430 (1960).

Passing to regulations governing matters more profane than matrimony, Army boards of review have assumed the legality of commonplace bans on gambling in dayrooms[221] and possessing liquor in communal housing.[222] Even to discuss the legality of these—and thus concede it is open to debate—would shock many commanders, and their reaction would be proper. Although much drinking and minor gambling may be innocent by all but the strictest standards and unoffensive to onlookers, the risk of disturbances justifies measures such as these.

Even though the types of regulations summarized in this section, even if all were in effect in a single command, do not in sum constitute a command direction of one's personal affairs hour by off-duty hour, they do in sum make a great inroad into one's liberty to do what he pleases. If not unsupportably arbitrary, as was the invalid marriage regulation in *Nation*,[223] they have not been held illegal because of this inroad. Judicial scrutiny has been limited to searching out the connection between the conduct being regulated and some military interest. So far, health, safety, and security measures have not been evaluated by delicate (and necessarily subjective) comparisons of convenience to the Army and inconvenience to the individual, or any other quantum balance of interests.

B. *PROTECTION OF PROPERTY*

There are very few reported cases construing or applying regulations designed to protect government property under a commander's responsibility, perhaps because most violations would be considered too petty to refer to a general court-martial for trial. Also, it is difficult to isolate protection of government property as a sole justification, for many specific provisions promote both personal safety and property protection.

For instance, many cases recounted in the last section pertained to motor vehicle regulations. To the extent these tend to safeguard government vehicles—either those being driven or those in the range of the havoc a reckless driver can bring about—protection of property buttresses the primary justifying military interest of reducing disabling accidents. The regulation prohibiting any person from driving any govern-

[221] CM 35118, DiGiovanni, 6 C.M.R. 325, *pet. denied*, 2 U.S.C.M.A. 661, 6 C.M.R. 130 (1952) (case arose at Camp Edwards, Massachusetts).
[222] CM 359587, Hudson, 8 C.M.R. 405 (1953).
[223] United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

ment vehicle after consuming any alcoholic beverage on the same day[224] was probably promulgated with greater concern for the vehicle than the driver.

Fire prevention is a principal concern of every small unit commander, and prohibitions against smoking in bed[225] or leaving electric appliances plugged in when a room is unoccupied[226] are very common. This type of command control over both personal conduct and use of personal property has not been controversial.

C. *ECONOMIC PROTECTION OF THE MILITARY COMMUNITY*

Many command regulations have been addressed to economic relations among members of the command, or between them and others. One species of these is protective—to prohibit or impose limitations on transactions so that members of the command will not be cheated or exploited. A desire to obviate these evils is paternalism; but in almost all the regulations which have found their way into appellate cases, a desire to obviate divisive frictions, bad community relations sore-spots, or morale defeating economic pressures from military members in positions of authority is also evident.

In *Giordiano*,[227] the Court of Military Appeals recently specifically upheld the legality of post regulations setting maximum interest rates on loans among military members. The defense made a specific attack that it "invades the accused's private rights without showing of its necessity to protect discipline or its connection with maintenance of good order in the service." [228] The Court unanimously disagreed with this contention without deigning to include any specific refutation in the opinion. Perhaps a more significant portent that the Court's conclusion that the subject matter's connection with military interests was self-evident was their statement that the "regulation is neither arbitrary nor unreasonable." [229] An echo of *National* [230] (the first Philippine

[224] *See* CM 351163, Day, 4 C.M.R. 278 (1952).

[225] *E.g.*, Headquarters Company, Seventh U.S. Army, Company Policies, sec. X, para. 8 (1 July 1962).

[226] *Id.* sec. X, para. 7.

[227] United States v. Giordano, 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964); see notes 137 & 138 *supra* and accompanying text.

[228] *Id.* at 166, 35 C.M.R. at 138.

[229] *Id.* at 167, 35 C.M.R. at 139.

[230] United States v. Nation, 9 U.S.C.M.A. 7[illegible] 26 C.M.R. 504 (1958).

marriage regulation case) can be heard here; judicial protection of personal activities consists not so much of carving whole areas of life out from a commander's domain, but of measuring the means and extent of regulation for reasonableness judicially determined.

Air Force boards of review have twice assumed without any specific comment the legality of regulations prohibiting financial transactions between one group which is in a peculiarly good exploitive position and another peculiarly susceptible to exploitation, namely, hospital orderlies and patient,[331] and training cadre and basic trainees.[332] One can easily imagine the effect that importunings to borrow money would have on the morale of the protected groups.

Lest it appear that regulations for economic protection are typically directed at preventing rapine within the ranks, the commander's action upheld in *Harper v. Jones*[333] should be recalled. In that celebrated controversy, a post commander in the United States, over the protests of the proprietor, placed off limits a used car business which had allegedly been defrauding soldiers. Of course, legality of the order for article 92 purposes does not necessarily follow from a determination that the commander's act cannot be overborne by the irate businessman. A particular propsective military customer might retort that he wanted to patronize a disreputable used car lot with eyes open because he enjoyed bargaining challenges. So many off-limits regulations apparently (from the geographic area in which the case arose) based on health have been assumed to be lawful[334] that there is little doubt that similar prescriptive economic protections are likewise lawful, even though a given customer is being protected paternally from himself.

In 1960, when the troop strength on Okinawa suddenly and greatly increased, concurrent travel of dependents to the island was terminated, and newly assigned personnel faced a delay of almost a year in obtaining government quarters. Very few private rental units had been constructed off post, so leases became the object of bitter and ruthless competition, which often resulted

[331] ACM S-2898, Hill, 5 C.M.R. 665 (1952).
[332] ACM S-4354, Hooks, 7 C.M.R. 629, *pet. denied*, 2 U.S.C.M.A. 680, 7 C.M.R. 84 (1952).
[333] 195 F.2d 705 (10th Cir. 1952).
[334] See notes 201 & 202 *supra* and accompanying text.

in such exhorbitant rent that an occupant's overall financial posture began to go bad with resultant files of dunning letters and bad check offenses. When it became apparent that the imbalance between supply and demand in housing was going to last for a few years at least, the command instituted new controls. In addition to pre-existing requirements for inspections of private rental units for sanitation and typhoon resistance, an evaluator was required to inspect the premises to compute the maximum permissible monthly rent.[235] Members of the command were then prohibited from entering into leases for more than the approved rent and from paying more than a prescribed deposit.[236] The rent control regulations had the desired effect. Officers and enlisted men who might have felt they should make any financial sacrifice in order to bring their dependents into the command immediately were not permitted budgetary self-immolation, and morale of newly assigned personnel increased perceptibly.

Somewhat similar rent control measures are in effect in Taiwan.[237] Once again, a group was to some extent saved from itself, but this is not the primary motivation behind the regulations. Rather, it is to save the command from a disgruntled group. Discipline and morale are intertwined.

D. *INDIRECT ECONOMIC ASSISTANCE TO THE HOST NATION*

The sensitivity of foreign economies to massive infusions of American merchandise and currency is apparent from the many decisions pertaining to command regulations governing the "economic man" in the service. Most of these concern controls on currency, use of military payment certificates overseas in lieu of United States currency, trafficking in sensitive kinds of merchandise or merchandise from certain sources such as an exchange, and rationing of the same kinds of merchandise.

This list of controls itself suggests that protecting a foreign economy from the disruption of our affluence is difficult to isolate as a separate, independent justification for command regulations,

[235] The formula included items for floor space, yard space, building materials, shelving, landscaping, age of building, condition, and "extra conveniences."

[236] USARYIS Cir. 600–13 (14 Oct. 1960), superseded by USARYIS Reg. 600–13 (8 Jan. 1964).

[237] Hq. U.S. Taiwan Defense Command Instruction No. 11101.1B, incl. 1 (27 July 1961).

for the same controls are so frequently the subject of departmental regulations [238] or international agreements. It would seem the economic command regulations are not justified only because and only to the extent they implement these more fundamental documents. They are lawful in themselves because it is a military necessity to live harmoniously with local officials overseas. The departmental regulations and international agreements only provide a back-drop in the usual case; because of them there are such things as military payment certificates, post exchanges, and custom exemptions, concerning which the particular command regulations are promulgated. Many of the most striking provisions are not specifically attributable to a departmental regulation or international agreement; the commander has apparently independently concluded that a control is necessary.

In the field of currency transactions, the Court of Military Appeals has assumed the legality of regulations limiting the amount of money that can be remitted from abroad and requiring the use of military banking facilities for this purpose,[239] prohibiting the acquisition of military payment certificates from an unauthorized source,[240] and restricting conversion of these certificates to dollar instruments.[241] Only in the last case did the Court directly relate any reason for the controls. There, dollar instruments had greater value in black market currency transactions than a nominally equivalent amount of military payment certificates.[242]

A board of review, upholding an officer's conviction for soliciting enlisted men to engage in prohibited conversions of military payment certificates for the benefit of a German citizen not entitled to possess them, went so far as to take judicial notice that the purpose of the regulatory provision was to prevent black-marketing.[243] The board obviously believed it unnecessary to articulate the next conclusion: that this is a legitimate subject of command interest and control.

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[238] *E.g.*, Army Reg. No. 37–103, chap. 12, sec. II (25 Aug. 1958), on military payment certificates; Army Reg. No. 60–20, para. 51 (14 April 1965) on privilege of patronage at exchanges overseas.

[239] *See* United States v. Mallow, 7 U.S.C.M.A. 116, 21 C.M.R. 242 (1956).

[240] *See* United States v. Gehring, 6 U.S.C.M.A. 657, 20 C.M.R. 373 (1956).

[241] *See* United States v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. 232 (1954).

[242] *Id.* at 239, 17 C.M.R. at 239.

[243] CM 353915, Powless, 7 C.M.R. 260, *pet. denied*, 2 U.S.C.M.A. 669, 7 C.M.R. 84 (1952).

Other Army boards of review have assumed the legality of command regulations requiring each person who wished to purchase a domestic postal money order to obtain his commander's signature on a formal "request for remittance," [244] and prohibiting the possession or use of United States currency in a "military payment certificate area," except for certain purposes and then only for limited periods of time.[245]

Although financial black-marketing should be equally of concern to commanders at all levels, a provision of the Army regulations seems by implication to restrict promulgation of military payment certificate regulations to high level headquarters, for it states in effect that the certificates cannot be acquired, possessed, or used in violation of directives of *major* overseas commands.[246] Such a restriction is sensible, for a lack of uniformity in financial controls within a fairly large area could lead to many inconveniences and inadvertent violations.

Restrictions on transactions in "trade goods" have been as common as upon currency exchanges. A number of cases include assumptions that regulations precluding resale of exchange items to persons not authorized patrons are lawful.[247] Coversely, one has assumed the legality of a provision that persons may purchase at exchanges only for their own consumption.[248] In other cases, the regulations assumed to be lawful prevented local transactions with a broader category of so-called "American goods," meaning in essence all those available to the serviceman from service sources, including what he brought with him and what is mailed to him through a military post office.[249]

Regulations such as these do not so much define wrongful conduct anew—for virtually everyone apprehends the economic evils of black-marketing—as they impose a direct means of enforcement by local commands. When the regulations seek to pinch off an opportunity for black-marketing by controlling private property which is not being used improperly per se but which only

[244] *See* CM 391083, Plante, 22 C.M.R. 389 (1956).

[245] *See* CM 353049, Hudson, 7 C.M.R. 162, *pet. denied*, 2 U.S.C.M.A. 668, 7 C.M.R. 84 (1952).

[246] Army Reg. No. 37–103, para. 12–32 (Change No. 10, 25 Aug. 1958).

[247] *See, e.g.*, United States v. Silva, 9 U.S.C.M.A. 420, 26 C.M.R. 200 (1958); ACM 5479, Lindsey, 7 C.M.R. 587 (1952).

[248] *See* United States v. Stone, 9 U.S.C.M.A. 191, 25 C.M.R. 453 (1958).

[249] *See* ACM 8350, LaCour, 17 C.M.R. 559 (1954); ACM 7506, Genesee, 13 C.M.R. 871 (1953); CM 354857, Lowry, 8 C.M.R. 344 (1952), *pet. denied*, 2 U.S.C.M.A. 679, 8 C.M.R. 178 (1953).

might be, our attitudes about the free exercise of the incidents of ownership are more likely to be offended. In a well-reasoned opinion, an Air Force board of review held legal an overseas base regulation prohibiting clandestine removal from the base of customs-free property.[250] Against a claim of error that the regulation was illegal because it amounted to legislation on the part of the base commander, the board decided it was not so illegal because he had both the power and responsibility to "legislate." In the more celebrated *Martin*[251] case—a rarity because the directive was a personal order—a sailor observed with a surfeit of cigarettes was lawfully prohibited from using them for barter. The Court noted that the ship was about to come to a port where "American cigarettes were at a premium and where black markets florish," [252] and concluded that:

> [T]he authority of the [ship's] executive officer could reasonably include any order or regulation which would tend to discourage the participation of American military personnel in such activities.[253]

In an earlier Navy board of review case,[254] a Sangley Point, Philippines, station order forbade taking more than two packs of "sea stores" cigarettes from the ship or base while on liberty. Although the legality of the order was not litigated specifically, in construing it the board looked to recitals contained therein that its purposes were threefold: to assist Philippine import control efforts, to prevent black-marketing by sailors, and to conserve the station's stock of cigarettes.[255]

Rationing acquisitions of post exchange and similar items is a typical command effort to foreclose the possibility of widespread black-marketing. Cases holding or assuming the legality of rationing or ration card control measures [256] are not precisely pertinent to issues of command impact on private rights, for an exchange has no more legal duty to sell unlimited quantities of merchandise to any one customer than does any other store; it

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[250] ACM S–6846, Barnes, 12 C.M.R. 735, *pet. denied*, 3. U.S.C.M.A. 835, 12 C.M.R. 204 (1953).

[251] United States v. Martin, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952).

[252] *Id.* at 676; 5 C.M.R. at 104.

[254] NCM 105, Johnson, 3 C.M.R. 412 (1952).

[255] *Id.* at 415.

[256] *See* United States v. Chasles, 9 U.S.C.M.A. 424, 26 C.M.R. 204 (1958) (merchandise control measure held legal); United States v. Dozier, 9 U.S.C.M.A. 443, 26 C.M.R. 223 (1958) (ration card controls assumed to be legal); ACM 6411, Ewing, 10 C.M.R. 612 (1953) (very broad ration card controls held to be legal).

is up to the exchange and its overseers what it will sell. But enforcement of rationing by convictions under article 92 for circumventions is quite different from merely enforcing a one-to-a-customer rule at a checkout counter. Present day rationing is seldom thought to be necessary because of any shortages of merchandise. The concern is the quantity of "trade goods" in the hands of possible barterers. Any non-arbitrary measures to limit this quantity should be lawful.

In a different vein, a number of overseas commands have promulgated severe restrictions on off-duty employment or commercial activities of members of the military community.[357] From their texts, it is not possible to ascertain whether these are published to implement agreements, as unilateral command measures to assist in enforcing local laws, or merely because the commander believes competition with local enterprise should be avoided. In Japan, a specific criterion for command approval of an off-duty enterprise is that it will not interfere with or tend to displace employment of Japanese in the same field.[358] This, it is submitted, is an entirely proper subject of command concern whether or not our government has by agreement committed itself to any protectionism. All such regulations purport to apply not only to service members but also to civilian employes and dependents, so the controls themselves are no more effective than the types of sanctions that can be invoked.[359]

In the only significant case in which off-duty commercial activities restrictions appear, they were assumed to be lawful [360] (as applied to a civilian employee accused, incidentally), but the conviction was reversed for failure of proof of knowledge of the regulations alleged.

In sum, the cases on regulations affecting foreign economies illustrate the legal propriety of military intrusion into activities completely divorced from military combat and training. Military interests include creating and preserving relations of trust and confidence with foreign officialdom; personal activities touching

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[357] *E.g.*, USARYIS Reg. 210–2, para. 5 (1 April 1963); USARJ Reg. 600–50, sec. IV (30 July 1964); Hq. U.S. Taiwan Defense Command Instruction No. 1050.6B (12 Aug. 1960) (which even prohibits deposits in local banks' interest bearing savings accounts).

[358] USARJ Reg. 600–50, para. 15a(6) (30 July 1964).

[359] See part II.B. *supra*.

[360] ACM 5985, Sarae, 9 C.M.R. 633 (1953).

these relations, being within the scope of these interests, may be treated as military duties.

E. *FEDERAL LAWS AND DEPARTMENTAL REGULATIONS IMPLEMENTED*

Because of the ineluctable urge of every headquarters to implement directives from above by publishing new directives, it is surprising that the relationship between a command regulation and departmental regulations or statutes has so seldom been mentioned as an element of the measure of legality. In any given command there will be many regulations which reiterate or carry further the superior edicts,[301] but for some reason these are not productive of litigation.

Logically, an activity should be deemed to relate or not relate to military interests by virtue of its own nature. If saying will not make it so at the overseas headquarters, it should not in Washington. Although the Court of Military Appeals has not yet had before it a case in which a departmental regulation has been held to be illegal because not related sufficiently to military interests, such a holding is entirely possible. In *Kauffman*,[302] the Court specifically decided that an Air Force regulation was lawful as a reasonable and necessary measure for the discipline and security of the service, and that it was not invalid because violative of the privilege against self-incrimination. Merely by meeting the issue, the Court has assumed the duty to examine departmental regulations as any others. And in *Voorhees*,[303] the Court (in three separate opinions) construed Army regulations to be much narrower in scope than the language of the provisions would convey. By no means are departmental regulations the determinant of what is military duty by mere *ipse dixit*.

On the other hand, the human tendency to assume that the regulations of a department more or less automatically create military duties because of their source is illustrated in *Porter*.[304]

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[301] For example, on insurance solicitations, motor vehicle transportation and disposition, standards of conduct in procurement activities, and Army postal systems.

[302] United States v. Kauffman, 14 U.S.C.M.A. 283, 34 C.M.A. 63 (1963).

[303] United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

[304] United States v. Porter, 11 U.S.C.M.A. 170, 28 C.M.R. 394 (1960).

The majority's opinion, in evaluating a post commander's regulations, stated:

> . . . [I]n case anyone has any doubt about the authority of the commander in question . . . we invite attention to the provisions of . . . Army Regulations 630–5 . . . .[365]

No doubt the majority arrived at a correct conclusion, but perhaps with misleading ease. Although a service secretary's regulations are promulgated under the authority of statute,[366] *Kauffman* and *Voorhees* portend a danger in accepting all provisions on blind faith.

Direct regulatory implementation of federal statutes applicable overseas has not given rise to any problems, probably because in most instances a prosecution under the "crimes not capital" clause of article 134 would lie as well as one under article 92. More troublesome and interesting are attempts by overseas commanders to take a federal statute not in effect outside the United States and, by regulation, enact it. To describe this anecdotically, the commander of the 313th Air Division on Okinawa in 1961 circulated for approval a draft tri-service circular intended to close an alleged customs loophole created by the inability of local officials to enter military air and sea ports to inspect incoming luggage. One paragraph contained a list of items newly arrived servicemen, civilian employees, and dependents would not be permitted to bring into the command. On the list, which was freely plagiarized from federal customs and criminal statutes,[367] were "contraceptive devices and pills." The proposal was much derided [368] and finally blocked by local Army headquarters comments that Congress enacted its list because of prevailing conditions and attitudes in the United States; not every statute lends itself to being exported by exercise of command. With a nervous eye on the probable reactions of dependent wives joining their sponsors after a separation of at least several weeks while housing was obtained, the Army urged that there was no military interest in rummaging through luggage for such items. The proposal was tabled indefinitely.

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[365] *Id.* at 173, 28 C.M.R. at 397.

[366] *See, e.g.*, 10 U.S.C. § 3012(g) (1964) (Secretary of the Army).

[367] *See* 18 U.S.C. § 1462 (1964).

[368] The Air Force draft also prohibited bringing in canned pineapple, because of local interest in protecting an infant industry. This was opposed by the Army because it looked silly. The amount of canned pineapple brought in in luggage could hardly affect the Ryukyuan economy, and any person who came in by military transport could soon buy at the commissary all the Dole products he or she could eat.

F. *INTERNATIONAL AGREEMENTS IMPLEMENTED*

Many times, command regulations enforced by appellate tribunals in upholding article 92 convictions would not have been in existence absent an international agreement. Two examples in Air Force board of review opinions are regulations controlling tax free liquor at Goose Bay, Labrador,[369] and prohibiting smuggling tax free goods out of Clark Air Base, Philippines.[370] Patently, obligations to the host nation originating in a base rights agreement are the motive for regulating. It is rather curious that an agreement itself has so seldom been brought to the surface and examined as an independent kind of justification for regulations.

In *United States v. Chasles*,[371] the issue of the validity of a command regulation controlling base exchange merchandise in England arose in an odd manner procedurally when the defense contended that the violative conduct was really only a disorderly solicitation denounced by article 134. In upholding the more serious conviction under article 92, the Court carefully examined the provisions of the North Atlantic Treaty Organization Status of Forces Agreement on customs activities, as illuminated by a quoted explanation by the Under Secretary of State to the Senate Committee on Foreign Relations. The regulations were held to be enforceable under article 92 because of the importance of the subject matter and consonance with the Agreement's objectives. Perhaps the Court could have arrived at the same conclusion by the simpler route of *Martin*:[372] that a commander inherently has authority to prohibit conduct disruptive of a foreign economy; but it is significant that the Agreement was considered so pertinent to the gravity of Airman Chasles's offense.

Similarly, in *United States v. Smith*,[373] when the Court had before it a controversial Headquarters, United States Army Europe regulation requiring private motor vehicle accident reports to American military authorities even for off-post collisions, it looked to our agreements with the Federal Republic of Germany as the source of military authority over motor vehicles

[369] ACM 9457, German, 18 C.M.R. 656 (1954), *pet. denied*, 4 U.S.C.M.A. 852, 18 C.M.R. 333 (1955).
[370] ACM S-6846, Barnes, 12 C.M.R. 735, *pet. denied*, 3 U.S.C.M.A. 835, 12 C.M.R. 204 (1953).
[371] 9 U.S.C.M.A. 424, 26 C.M.R. 204 (1958).
[372] United States v. Martin, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952).
[373] 9 U.S.C.M.A. 240, 26 C.M.R. 20 (1958).

despite the alternative view that "[c]onceivably, the power to prevent their use might be found in military necessity. . . ." [274] Clearly, our agreements were considered to be the more self-evident source of power to regulate, compared with military interests in the activity itself. And equally clearly, the specific measure at issue was not compelled by the agreement nor even specifically contemplated. It was merely one reasonable means of fulfilling our general agreed obligations to promote safety in motor vehicle operation.

Chasles and *Smith* fall short of satisfying the natural curiosity about the extent to which agreements permit command control in the absence of any independent military interest in the conduct. To put it another way, is there a *Missouri v. Holland*[275] type of rule permitting command intrusions into personal activities solely because of international obligations, when the military interest in the absence of the obligations would be insufficient justification? (In *Chasles* and *Smith* there probably was an adequate independent military interest.) Although an answer is necessarily speculative, in this author's opinion it must be a qualified "yes." [276] As long as American strategic planning includes large numbers of troops in forward areas abroad and our host nations are independent, the conditions and circumstances of our presence abroad are necessarily affected by our hosts' attitudes. When mutual concessions are reduced to an agreement, its object is not merely to promote felicitous relations but to provide a vehicle for American strategic deployment. Whatever is in the agreement becomes a military interest, because that is how we must get along with the host in order to stay in forward areas.

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[274] *Id.* at 241, 26 C.M.R. at 21.

[275] 252 U.S. 416 (1920).

[276] Implicitly, a Navy board of review in NCM 66-1033, Manos, 36 C.M.R. 781 (1966), *pet. granted*, 20 Dec. 1961, 67-1 JALS 17, measured the validity of a regulation and upheld it by reference to the military interest in cooperating with the host government, pursuant to international agreement. The senior Navy commander in Japan had promulgated the regulation, which prohibited all personnel under age 20 from drinking alcoholic beverages on or off post, conformably to the law of Japan to which United States personnel were subject. The board of review commented that the local Navy command had a positive duty to cooperate in the enforcement of the local law. Query, if so broad a prohibition, particularly as it extended to off post conduct, would otherwise be valid. If one assumes it would not be, *Manos* represents a regulatory analogue to *Missouri v. Holland*. It is hoped that the Court of Military Appeals will, in *Manos*, meet the issue directly.

The qualifications upon the self-sufficiency of agreements as a justification for command regulations are two-fold. First, it is difficult to conceive of any theory by which an executive agreement could permit command abrogation of such statutory and constitutional rights[277] as the privilege against self-incrimination and confrontation with witnesses. Second, as *Chasles* and *Smith* illustrate, the specific regulation in issue will not usually be reiterative of the agreement. It will be a measure purportedly consistent with and in furtherance of the aims of the agreement—a means of complying with it. Because the commander will usually possess broad discretion how he will go about achieving compliance, there will inevitably be a possibility that his means are arbitrary or too remotely connected with the agreement to be a proper implementation.

G. *LACUNAE IN LOCAL CONTROLS*

The existence or nonexistence of local legislation governing a type of conduct has nothing to do with whether the conduct affects morale, discipline, good order, or usefulness of a command. The conduct itself is the determinant. But lacunae in local controls are pertinent in deciding whether, conceding a military interest in having the conduct regulated by someone, the military is permitted to be the one.

The issue of military occupation of a regulatory gap has arisen in administrative opinions on the overseas commander's powers to regulate motor vehicles on public highways abroad. In 1958, an important opinion was rendered that military commanders had no authority to regulate speed limits on the public highways in Germany and France, as in the United States.[278] Despite this opinion, military traffic regulations were continued in effect throughout the Ryukyu Islands—on and off post.[279] Because the local courts were unable to exercise jurisdiction over members of the armed forces under the fundamental law obtaining,[280] if the service commanders had

[277] But see parts II.D. & III. *supra* concerning the extent of such rights, particularly those which are not procedural advantages in criminal trials, and United States v Smith, 9 U.S.C.M.A. 240, 26 C.M.R. 20 (1958).

[278] JAGA 1958/5147, 10 July 1958, 8 DIG. OPS. 225 (1959).

[279] *E.g.*, USARYIS Cir. 190–2 (10 Aug. 1961).

[280] Sec. 10, Exec. Ord. No. 10,713, 5 June 1957, 3 C.F.R. 368 (1954–58 Comp.), *as amended by* Exec. Ord. No. 11,010, 21 March 1962, 3 C.F.R. 587 (1959–63 Comp.). Government of the Ryukyu Islands courts had no criminal jurisdiction over United States servicemen. United States Civil Administra-

failed to enter the field there would have been vehicular anarchy.

A most illuminating subsequent opinion relating to the promulgation of traffic regulations in Taiwan includes this observation:

> . . . [W]ith respect to the regulations of off-base operation of private vehicles the key issue is the presence or absence of a superior source of regulatory authority, which source may be expected to insist upon its prerogatives . . . . [W]ithin the United States, such a source is present in the form of various states and local agencies. Accordingly, in the United States there is no "direct connection" with discipline, the military commander is not charged with the primary "responsibility" for traffic regulations, and such regulations are not "reasonably necessary." [281]
>
> In overseas areas, a different factual situation may exist due to international agreements or understandings . . . . In determining whether, with respect to traffic regulations in overseas areas, any authority superior to that of the military commander exists, a number of factors must be considered.[282]

Some of these factors are the legal basis for the presence of United States forces in the nation, the members' personal status there (particularly, whether diplomatic or not), and specific local traffic provisions and civil agencies available for their enforcement.[283] Apparently, military authorities in Taiwan were once satisfied that conditions there[284] permitted military traffic regulations applicable island-wide.[285] The substantive provisions they have promulgated simply duplicate the local law, or at least the fundamentals such as speed limits and pedestrian right-of-way.

Another important administrative opinion, addressed to the Judge Advocate, Headquarters, United States Army Europe,

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tion courts could exercise it only after a waiver by the offender's senior service commander in the islands. No waiver has ever been requested or given.

[281] Query, if one decides that there is any substantial military interest in personal safety on public highways—necessarily a federal interest—what of the supremacy clause (U.S. CONST. art. VI, cl. 2)? *Cf.* Paul v. United States, 371 U.S. 245 (1963), in which there was a direct federal-state clash of policy.

[282] JAGJ 1963/8424, 11 April 1963.

[283] *Id.*

[284] At the time, most United States military personnel in Taiwan enjoyed diplomatic type immunity and were not subject to local law enforcement. A status of forces agreement became effective on 12 April 1966. *See* Agreement with China Relating to the Status of U.S. Army Forces in China, 31 Aug. 1965. [1966] 1 U.S.T. 373, T.I.A.S. No. 5986.

[285] *See* Hq. U.S. Taiwan Defense Command Instruction 5560.3c (25 Jan. 1960).

recounts the principal conceptual barrier to military control of off-post traffic at greater length, observing:

> Under customary international law the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. Exception to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself . . . . The promulgation and enforcement of such regulations finds its authority . . . in the obligations assumed under and the situation resulting from international agreement with the local sovereign power . . . . [I]n *United States v. Smith* (9 USCMA 240; 26 CMR 20 (1958)) the court found enforceable a regulation promulgated to implement treaty rights and obligations even though it limited off-post conduct in a manner not permissible within the United States.[286]

The opinion concluded that United States-German agreements authorize military traffic regulations governing conduct on public highways, including speed limits, conformable to German law. Should our commander desire to promulgate provisions which deviate from German law, he should, except in cases of military exigency, inform the German government of his intent. Further, he may assume its consent in the absence of a reply to the contrary.[287]

Two slightly different rationale have been expressed, therefore, for affording an overseas commander more authority over off-post conduct than his counterpart at home. The first emphasizes international agreements among the conditions of our presence abroad as affecting the extent to which military rather than, or in addition to, local authorities might be vested with regulatory authority. The second comtemplates that lacunae in local governmental controls over visiting forces' private automobiles are inherently and necessarily intended, the intention being manifest in consent to military control. Under this view, the lacunae in local control have no independent significance in justifying command action; they are the justifying international agreement viewed in reverse.

The contrast between attitudes toward regulating off-post operation of automobiles and other off-post activities is stark. Military commanders are inveterately issuing provisions forbidding patronage of lawful businesses, clearing the streets of servicemen by certain hours even though there is no local curfew, and forbidding possession of substances or instruments

[286] JAGW 1962/1056, 13 April 1962.

[287] *Id.* Compare the earlier, more restrictive, less analytical view expressed in JAGA 1958/5147, *supra* note 278.

not offensive under the local law. In these areas, the host nation is exercising its powers as much as over traffic, but it is doing so permissively. Although by customary international law visiting forces are permitted to administer themselves internally under their own laws and regulations,[188] these areas of conduct are not purely internal any more than driving upon the autobahn. I doubt if military control over them is very often thought to rest on specific agreements. One may suspect, therefore, that the significant difference between enforcing, say, off-limits regulations and traffic regulations is practical rather than conceptual. If the military simply aggrandizes control over the latter, there may be an unseemly duplication or even competition in police efforts in actual enforcement. This is not so as to the former.

H. *FOSTERING MORALITY*

The old image of an Army of grizzled and profane lechers is anathema today. A lot of effort is being expended in character guidance and similar programs to make the Army moral. In what is perhaps a tacit concession of the impossibility of completing the task, other efforts are directed to making the Army seem moral. These include moralistic regulations.

Soon after the Uniform Code's enactment, an Air Force board of review had before it a case of violating a regulation in Korea placing all houses of prostitution off limits.[189] Not surprisingly, it was assumed to be lawful. Perhaps its true purpose was to protect the physical, rather than the moral, man but its moral overtones are clear. The conviction was set aside because of insufficient evidence that the establishment in which the accused was found was of the proscribed kind.

The rest of the cases concern regulations governing the presence of women in barracks or bachelor officers' quarters. It might be said that the true basis for these is the commander's power over the property as a sort of landlord's agent. If the sanction were eviction of offending residents, that observation might be true. With possible criminal conviction in the background, the power is clearly exerted over the person of the residents.

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[188] JAGW 1962/1056, 13 April 1962.
[189] ACM S-2446, Moss, 3 C.M.R. 773 (1952).

In *United States v. Snyder*,[200] the Court of Military Appeals assumed the legality of and affirmed a conviction for violating Camp Lejeune regulations forbidding female civilians to enter barracks. So straightforward a regulation, so commonplace a restriction could scarcely be controversial.

A bit more complicated regulation appeared in an Army board of review case, *McGovern*.[201] A post commander, presumably in a European Kaserne,[202] put out a regulation that members of the opposite sex could be entertained in bachelor officers' quarters, but subject to the "limitations of good taste." Lest there be differences in construction of that term, it was defined: at least two guests had to be present and the visit had to end at midnight. The board assumed the regulation was legal, but held that the specification failed to state a violation because it included no allegations that the visit lasted after midnight or that only one girl was present. It was not enough just to allege that a female was in the quarters. It must be conceded, it seems, that the commander's conception of good taste was rather arbitrary at least in its precise bounds, but equally to be conceded is that any reference to good taste was but surplusage at best. His conditions of entertaining were within reason, although reason could encompass much on either side of the lines he drew. It is pointless to decry, as many counsel have, subjective moral attitudes in regulations, if the conduct is amendable to command regulation at all. Drawing lines is the commander's privilege, if the line is drawn so that conduct within it relates to morale, discipline, or well-being of the force. Interestingly, no conviction of violating the *McGovern* regulation was affirmed by a board of review.[203]

Because commanders' attempts to legislate morality (at least those appearing in appellate opinions) have been modest, the extent to which morality of conduct by itself relates to military interests and so is subject to control is unclear. Two observations are worth repeating. First, morals regulations can usually be tied in with some other justification, such as health or good order in quarters or in town. Second, merely because conduct is not per se violative of article 134 as service discredit-

[200] 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

[201] CM 353793, McGovern, 5 C.M.R. 154 (1952).

[202] Presumably, as the pertinent girl's name was Gerda Johanna Ruess.

[203] *See* CM 354324, Heck, 6 C.M.R. 223 (1952); CM 354571, LaMothe, 6 C.M.R. 257 (1952); CM 354597, Thomas, 6 C.M.R. 259 (1952); in all, convictions were set aside for illegal searches.

ing or prejudicial to good order and discipline does not mean that it cannot be prohibited—and thus made criminal in effect—for purposes of article 92.[294]

I. *MAINTAINING GOOD PUBLIC APPEARANCES*

Decided cases in which an order's or regulation's sole basis of validity must be a military interest in presenting a good appearance to the world through individual servicemen are rare. Indeed, they are confined to a concern with proper dress.

Cases affirming regulations requiring soldiers to wear uniforms while off-duty and off-post reflect a more substantial military interest that the soldiers be identifiable.[295] Identifiability clearly does affect some exertions of military control in alert recalls to post and the like. More pertinent to the isolated question of imagery are regulations requiring a particular kind of uniform to be worn, or particular standards of civilian dress. In *United States v. Crooks*,[296] the Court of Military Appeals assumed the legality of the familiar prohibition against wearing field clothing off post. What possible justification could there be for this except a determination that field clothing does not look good?

Today there seems to be much command interest in the civilian attire worn by the off-duty soldier. He is often ordered to look good. Some directives require items of attire such as neckties;[297] others forbid items, such as Korean "short-timer"

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[294] *See* notes 5, 23 & 24 *supra* and accompanying text.

[295] *See* United States v. Yunque-Burgos, 3 U.S.C.M.A. 498, 13 C.M.R. 54 (1953). In United States v. Chowalter, 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965), the Court of Military Appeals conceded that a general regulation prohibiting the wear of civilian clothing off compound in Korea was lawful, but held that footnote 5 to the Table of Maximum Punishments, MCM ¶ 127, limited the maximum punishment for violation to that prescribed for a simple uniform violation. All the circumstances of our military presence overseas are material not only to the legality of orders but also to the seriousness of violations. In *Yunque-Burgos*, the directive was applied in occupied Germany. Precluding assimilation of troops into a possibly hostile population was felt to be a subject of serious command concern. According to the Court of Military Appeals, the same degree of concern could not obtain in Korea, where our forces are present among an allied Asian population.

[296] 12 U.S.C.M.A. 677, 31 C.M.R. 263 (1962). *See also* United States v. Simpson, 2 U.S.C.M.A. 493, 9 C.M.R. 123 (1953).

[297] USAREUR Reg. 670–5, para. 3 (10 June 1964).

jackets [298] with incomparably gaudy embroidery, or blue jeans.[299]

Public image, and not concern about breaches of the peace, may well underlie the common prohibition against mere possession of opened bottles of liquor in public places.[300] The mere appearance of the conduct is thought to be offensive.

No reasonable distinction can be drawn between the *Crooks* case and those in which civilian clothing or other visible items are in issue on the grounds that, in *Crooks*, what gave the commander his authority was his interest in a type of uniform. Wearing a field jacket in a downtown bar does not affect it as property. The commander's interest in it is only as it affects the appearance of the person wearing it, who will tend to be identified in the eyes of foreign onlookers as an American. The same identification will surely be made of one clad in blue jeans and a tee shirt, or publicly carrying a bottle of bourbon by the neck.

So long as presenting a good public appearance is a basis for issuing so commonplace regulations in areas of traditional military authority, little controversy can be expected. But commanders and judge advocates alike should reflect upon recent warnings that public relations can become too absorbing an interest, to the point that one can lose sight of the "soldier's legitimate urge to express the peculiarities of his own character." [301] There is a danger that a commander's attitudes about the proper public image are so subjective and so tenuously, if at all, connected with the maintenance of a fighting force that regulations reflecting them would not be sustainable. The misfortune of such a holding is that, until the resolution of the issue, most of the command would have obediently accommodated to a mere caprice.

V. RECOMMENDATIONS

Although appellate tribunals have occasionally been so convinced that a justifying military interest is apparent on the face of a regulation that they would take "judicial notice" of its pur-

[298] *Id.*

[299] Hq. U.S. Taiwan Defense Command Instruction No. 1020.4A, para. 5c (28 Oct. 1960).

[300] *See, e.g.*, Hq. Eighth U.S. Army Reg. No. 230–9, para. 10f (24 Dec. 1963); Hq. USARYIS Reg. No. 210–2, para. 6c(7) (10 April 1964).

[301] Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97, 124 (1964).

poses,[302] or accept recitals of purpose in a preamble,[303] or simply make assumptions as to the impact of particular conduct on a command,[304] the issue may not always be so simply resolved. The limited effect of a presumption of legality has already been described.[305] Commanders and prosecutors should be prepared to demonstrate the factual justification for regulations touching the person life. This should not be burdensome if the commander is not acting arbitrarily, for he must have been moved to issue the regulations by the facts as he observed them or as they were related to him.

These facts are or easily could be reflected in hospital records, police blotters, records of complaints, courts-martial records of trial and records of nonjudicial punishment, and many more military records, and documents maintained by the local government. Collecting and organizing the justifying data and obtaining illuminating opinions thereupon by staff members with expertise is well worth the effort for two reasons. It should tend to obviate burdensome regulations based upon gross observations which cannot survive analysis, and thus remove a very source of embarrassing litigation. Then, if the regulation is promulgated, an organized justification should not only preserve the strongest case for the prosecutor but provide an intangible but, in the author's opinion, important element of sheer persuasion: good faith on the part of a commander who is painstaking and conscious of the sacrifice of liberty brought about by the exercise of his powers.

After justification for regulations has been prepared and documented and one commences the actual task of drafting, he should have in mind not only expressing the rules to be established, but the means of enforcement which can be brought to bear on the various types of persons affected, with particular emphasis on administrative sanctions; clearcut distinctions between command powers and civil powers and the machinery for enforcing each, if the commander has civil powers; and the type of constitutional rights that are inviolable by regulations, generally those granted to a person accused of crime, as contrasted with those such as free exercise of religion which may be subordinated to military necessities. At the drafting and promulgating stage, the

[302] CM 353915, Powless, 7 C.M.R. 260 (1952).
[303] NCM 105, Johnson, 3 C.M.R. 412 (1952).
[304] United States v. Yunque-Burgos, 3 U.S.C.M.A. 498, 13 C.M.R. 54 (1953); CM 403928, Jordan, 30 C.M.R. 424 (1960).
[305] See part II.E. *supra*.

presumption that a regulation is legal should not be relied upon, for its role should be limited to placing the burden of going forward with the evidence upon the accused at trial.

VI. CONCLUSIONS

The principal conclusion to be drawn from the many instances in which an overseas commander's regulatory powers have been brought in question, as compared with the few in which they have been held to have been improperly exercised, is that the powers are formidable. That adjective is used advisedly, for it connotes a capacity to excite apprehension. A libertarian may be concerned about the following incidents of the powers:

First, they are not exercised in the course of a political process which engenders abnegation or compromise.

Second, the result of their exercise is the same as enacting legislation enforceable by criminal prosecution.

Third, the punitive sanctions are supplemented by a variety of administrative sanctions which can have vexatious and far-reaching consequences.

Fourth, the military interests which justify regulations are many, broad, and overlapping.

Fifth, assuming a military interest, that an activity is primarily personal does not render it immune from regulation even if it is the subject of general constitutional solicitude, such as free speech.

Sixth, assuming a military interest, the only activities absolutely immune from regulation are those vouchsafed to a criminal defendant by the Constitution or statute, or those which have been removed from regulatory authority by a higher law or authority, specifically or by necessary implication.

Seventh, the circumstances of our forces' presence in and relationships with the local community overseas, particularly any pertinent agreements, may enlarge military interest in personal conduct and so subject it to regulation.

On the other hand, command power over the personal life is not plenary, because:

First, regulations may be held to be unenforceable if too broad or too vague.

Second, specific measures may not be arbitrary, particularly in the sense that they have no reasonable tendency to accomplish the lawful purpose to which purportedly addressed.

Third, over every headquarters is a higher headquarters, capable of correcting excesses for policy reasons if for no other.

On balance, the cases compel the conclusion that the power to regulate is awesome compared to the recognized limits upon it. Considering the sheer bulk of regulations in force, it is significant that only in the *Nation* marriage regulation case has the Court of Military Appeals disapproved a general regulation in effect abroad. Cases resulting in disapproval of personal orders because they were too broad, or too vague, or insufficiently connected with a military purpose,[306] or in violation of the rights of a criminal defendant[307] are all fairly clear instances of illegality and have had little impact on subsequently promulgated regulations.

Because government by command regulation edges closer to a rule of men than Americans are accustomed to in their political experiences, the kind of men who are our commanders is supremely important. The personal qualities which are reflected in regulations of easily discernible propriety are, in the author's opinion, a comprehension of the human propensity to err, discriminating powers of observation, capacity for abnegation, appreciation that promulgating regulations is only one means of moulding a disciplined force, and recognition that members of a military community in good faith but legal misapprehension are inclined to assert greater rights than those which actually exist. Respecting these assertions for what they are, a consequence of growing up in a free society as an independent person, is an attribute of beneficient command.

[306] *See* notes 2, 175–177 *supra* and accompanying text.
[307] *See* p. 83 *supra;* notes 162 & 163 *supra* and accompanying text.

HUMAN RIGHTS IN THE ADMINISTRATION OF PHILIPPINE MILITARY JUSTICE*

By Lieutenant Colonel Primitivo D. Chingcuangco**

The author discusses certain rights contained in the United Nations Universal Declaration of Human Rights, indicating the extent to which those rights are protected under the present military justice system of the Philippine Armed Forces. He concludes that substantial protections are now afforded an accused under the Philippine system but that further advancement in the area is desirable.

I. INTRODUCTION

A. *PURPOSE AND SCOPE*

The purpose of this article is to present a broad picture of how the principles of the Universal Declaration of Human Rights[1] pertaining to the application of criminal law are observed within the framework of our military justice system. What the Declaration defines as *human* rights[2] are to us *civil or legal* rights under the Philippine Constitution and Articles of War,[3] which, together with the *Manual for Courts-Martial, Phil-*

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** JAGS; Chief, Military Justice Branch, JAGO, Philippine Armed Forces; LL.B., 1941, LL.M., 1948, University of Santo Tomas; member of the Philippine bar; graduate of 39th Special Class, The Judge Advocate General's School, U.S. Army; Attorney and Counsellor of the United States Court of Military Appeals (Honorary).

[1] G.A. Res. 217, 3 U.N. GADR, Res. I, at 71, U.N. Doc. No. A/810 (1948) [hereafter called the Declaration and cited as UDHR].

[2] The Declaration contains nothing more than a mere recommendation, or a common standard of achievement for all peoples and all nations. Ichong v. Hernandez, GR No. L-7995, 31 May 1957. *But see* Majoff v. Director of Prisons, GR No. L-4254, 26 Sept. 1951.

[3] Hereafter cited as AW ____, PA.

ippine Army,[4] are the primary sources of the military criminal law in this jurisdiction.

The scope of this article is limited to that category of cases which Mr. Chief Justice Warren of the United States Supreme Court described as the vertical reach of the Bill of Rights within the military; that is, a class of cases that involves questions concerning the military establishment's treatment of persons who are concededly subject to military authority.[5] Therefore, neither the legal struggle between protected liberties and military necessity nor the relationship of the military with the civil government or affairs will be treated here. This article is confined substantially to the pertinent provisions of the Universal Declaration of Human Rights[6] and their counterparts in our Constitution and Articles of War. Related constitutional and statutory provisions dealing with certain rights of accused military personnel are, to a limited extent, likewise treated in this article. Some discussion is also devoted to the inapplicability of some constitutional safeguards to the members of the armed forces.

B. *THE SOLDIER AND THE CITIZEN*

Inscribed across the dome of the Arlington Memorial Amphitheater is the following declaration: "When We Assumed the Soldier, We Did Not Disregard the Citizen." This inscription reflects the proposition recognized in *Burns v. Wilson*[7] that the citizens of the United States in uniform may not be stripped of basic rights simply because they have doffed their civilian clothing. The same basic principle is observed in our system of jurisprudence. But, cast in the background of his basic mission, the soldier's rights in this respect must of necessity be "conditioned to meet certain overriding demands of discipline

[4] Hereafter cited as MCM, PA.

[5] Warren, *The Bill of Rights and the Military*, AF JAG Bull., May–June 1962, p. 6, 9.

[6] This article does not discuss the United Nations draft International Covenants on Human Rights, a composite text of which appears in 58 AM. J. INT'L L. 857 (1964).

[7] 346 U.S. 137 (1952). An individual does not cease to be a person within the protection of the fifth amendment (due process) of the United States Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944).

and duty." [8] In our republican form of government, it is Congress which must strike the exact balance in this personality adjustment.

C. *GENERAL CONCEPT AND NATURE OF COURTS-MARTIAL*

For the purpose of this article, it is worthwhile to review briefly the concept and nature of courts-martial. At this juncture, let it be recalled that the Philippine Articles of War (Commonwealth Act No. 408), enacted in 1938, was patterned after the United States Articles of War of 1920. A substantial portion of the United States military jurisprudence, particularly in the area of military criminal law, constitutes a fertile source of authoritative precedents for the resolution of our military justice problems, both substantial and procedural.[9]

1. *General Concept.*

Courts-martial are lawful tribunals with authority to determine finally any case over which they have jurisdiction; they are supreme while acting within the sphere of their exclusive jurisdiction.[10] It should be observed in this connection that courts-martial have *exclusive* jurisdiction of purely military offenses, such as desertion, free from interference by the civilian courts.[11] As to offenses not of a purely military nature, the jurisdiction of a court-martial is *concurrent* with that of the civilian courts,[12] the jurisdiction which first attaches in any case being entitled to proceed therein.[13] Persons subject to military law cannot, however, while in that status, claim the right to trial by the civilian courts for offenses over which courts-martial have concurrent jurisdiction.[14] Conversely, such persons enjoy no constitutional right to be tried only by courts-martial to the exclusion of the civilian courts.[15] In

[8] Burns v. Wilson, 346 U.S. 137, 140 (1952).

[9] United States precedents have been largely relied upon by the Philippine Supreme Court in most of its decisions on military justice matters.

[10] McLean v. United States, 73 F. Supp. 775 (W.D.S.C. 1947).

[11] *In re* Zimmerman, 30 Fed. 176 (C.C.N.D. Cal. 1887).

[12] Caldwell v. Parker, 252 U.S. 376 (1920); Crisologo v. People, 50 OG 1021 (1954); Valdez v. Lucero, 76 Phil. 356 (1946); People v. Rio, No. 03077-CR., 20 Oct. 1963, 60 OG 7400.

[13] WINTHROP, MILITARY LAW AND PRECEDENTS 94 (2d ed. rev. & enl. 1920 reprint) [hereafter cited as WINTHROP].

[14] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[15] *See* United States v. Canella, 157 F.2d 470 (9th Cir. 1946), *aff'g* 63 F. Supp. 377 (S.D. Cal. 1945); People v. Livara, GR No. L-6201, 20 April 1954.

sum, the accused cannot select the jurisdiction in which he will be tried.[16]

2. *Agencies of the Executive Department.*

Unlike courts of law, courts-martial are not a portion of the judiciary. They are merely creatures of orders; the power to convene them, as well as the power to act upon their proceedings, is an attribute of command.[17] Not belonging to the judicial branch of the government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the armed forces and enforcing discipline therein.[18]

3. *Constitutional Sense.*

Courts-martial are not included among the "inferior courts" which Congress may establish under section 1, article VIII of the Constitution, defining where judicial power of the Philippines shall be vested.[19] Neither are courts-martial included in the words "inferior courts" used in section 2, article VIII of the Constitution in connection with the appellate jurisdiction of the Supreme Court to review judgments involving the death penalty.[20] Within the meaning of section 17, article VI of the Constitution prohibiting any member of Congress from appearing as counsel before any court in any criminal case wherein any government officer or employee is accused of an offense committed in relation to his office, courts-martial are included in the term "any court" and court-martial cases are deemed "criminal cases." [21]

4. *Court of Law and Justice.*

Notwithstanding that the court-martial is only an instrumentality of the executive power having no relation in law with the judicial establishment, it is yet, so far as it is a court at all and within its field of action, as fully a court of law and justice as is any civilian court.[22] As a court of law, it is

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[16] Harris v. Hunter, 170 F.2d 552 (10th Cir. 1948).
[17] *See* DAVIS, MILITARY LAW OF THE UNITED STATES 15 (3d ed. 1913).
[18] Ruffy v. Chief of Staff, 75 Phil. 875 (1946).
[19] *Cf.* WINTHROP 49.
[20] Ruffy v. Chief of Staff, 75 Phil. 875 (1946).
[21] Marcos v. Chief of Staff, 89 Phil. 246 (1951). *See also* Maronilla-Seva v. Andrada, 89 Phil. 252 (1951).
[22] WINTHROP 54.

bound, as is any court, by the *fundamental principles* of criminal law; and, in the absence of special provisions on the subject in the military code, it observes in general the rules of evidence as adopted in the civilian courts."[32] As a court of justice, it is required by the terms of its statutory oath under Article of War 19 to adjudicate between the People of the Philippines and the accused "without partiality, favor, or affection," and according not only to the laws and customs of the service but also to its "conscience," *i.e.*, its sense of substantial right and justice unaffected by technicalities."[33]

5. *Criminal Court.*

A court-martial is strictly a criminal court, and its judgment is a criminal sentence, not a civil verdict.[34] The prosecution of an accused before a court-martial would, under certain conditions, be a bar to another prosecution of the defendant for the same offense, because the latter would place the accused in double jeopardy.[35]

6. *Judicial Review.*

The proceedings of a court-martial are not subject to *direct* review by the civilian courts, nor are its judgment or sentence subject to appeal to such civilian tribunals.[36]

Judicial noninterference with court-martial proceedings, however, is not absolute. It has been held that a civilian court in habeas corpus proceedings may inquire whether the court-martial was properly constituted, whether it had jurisdiction of the person and subject matter, and whether it had power to impose the sentence which it did impose. The single inquiry—the sole test—is *jurisdiction.*[37]

7. *Development of the Law.*

The law and jurisprudence regarding the concept of courts-martial, the judicial review of court-martial proceedings, and the applicability of the Bill of Rights to courts-martial has undergone some evolution. Thus, in the United States and in this jurisdiction, in a limited sense, the early concept that a

[32] WINTHROP 54, 313–14; *see* AW 37, PA.
[33] *Cf.* WINTHROP 54.
[34] *Id.* at 55.
[35] Marcos v. Chief of Staff, 89 Phil. 246 (1951).
[36] WINTHROP 50.
[37] United States *ex rel.* Innes v. Hiatt, 141 F. 2d 664 (3d Cir. 1944); Ognir v. Director of Prisons, 80 Phil. 401 (1948); Hiatt v. Brown, 339 U.S. 103 (1950); United States v. Grimley, 137 U.S. 147 (1890).

court-martial is *merely* an instrumentality of command has, to some extent, been somehow repudiated. On the part of the United States, the enactment of the *Uniform Code of Military Justice* and the creation of the Court of Military Appeals attest to this development. Here, the 1948 and 1950 amendments to the Articles of War, particularly those which attempt to eliminate command influence and those which extend more rights to the accused, are expressive of this evolution.

In the field of judicial review of court-martial proceedings, we will briefly examine the phase of the military's relationship to its own personnel and the scope of habeas corpus inquiry. Insofar as the relationship of the military to its own personnel is concerned, the basic attitude of the United States Supreme Court, according to its own Chief Justice, has been that the latter's jurisdiction is most limited.[29] Thus, the United States Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham*[30] that it lacks jurisdiction to review by certiorari the decisions of military courts.[31] In this area there is no change in the law. The American tradition, from the Revolution Era until now, has supported the military establishment's broad power to deal with its own personnel.[32] It is observed that the most obvious reason for this is the fact that the courts are ill-equipped to determine the impact upon discipline that a particular intrusion upon military authority might have.[33] Many of the problems of the military society, it is said, are in a sense alien to the problems with which the judiciary is trained to deal.[34] Additionally, "[o]f questions, not depending upon the construction of the statutes, but upon unwritten military law or usage within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law." [35]

On the other hand, the traditional rule—that by habeas corpus the civilian courts exercise no supervisory or correcting power over the proceedings of a court-martial, the single inquiry

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[29] Warren, *supra* note 5, at 10.
[30] 68 U.S. (1 Wall.) 243 (1864).
[31] Warren, *supra* note 5, at 10.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Smith v. Whitney, 116 U.S. 167, 178 (1885).

being jurisdiction—has been expanded in recent years.[36] In the case of *Burns v. Wilson*,[37] the United States Supreme Court held that, in addition to the traditional test, the civilian court may also inquire whether the military has dealt fully and fairly with each of accused's claims advanced in his application for the writ. The Court, in reality, held that court-martial proceedings can be challenged through habeas corpus actions brought in the civilian courts, if these proceedings have denied the accused fundamental rights.

How the United States Court of Appeals for the 10th Circuit applied this new test may be gleaned from *Easley v. Hunter*[38] and *Bennett v. Davis*.[39] In these two cases, the court in effect held that for the purpose of habeas corpus proceedings there must be at least some allegations that the issues have been raised in the military proceeding and that these questions presented were not fully and fairly determined by the military courts, or that the procedure for the military review was not legally adequate to resolve those questions.[40] *Palomera v. Taylor*[41] restates the rule.

Before leaving this field, it is profitable to note that events quite unrelated to the expertise of the judiciary have required the modification of the United States traditional theory of military authority.[42] Chief Justice Warren summed up these events in numerical terms.[43] A few months after Washington's first inauguration, the United States Army numbered a mere 672 of the 840 authorized by Congress. In 1962, the United States Armed Forces numbered two and a half million while veterans numbered 22½ million. When the authority of the military has such a sweeping capacity for affecting the lives of the United States citizenry, Chief Justice Warren observed, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

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[36] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944).
[37] 346 U.S. 137 (1953).
[38] 209 F.2d 483, 487 (10th Cir. 1953).
[39] 267 F.2d 15 (10th Cir. 1959).
[40] *See* Kiechel, *The Scope of Collateral Review of Court-Martial Convictions in the Federal Courts*, AF JAG Bull., March-April 1962, pp. 3, 5.
[41] 344 F.2d 937 (10th Cir. 1965); *see* Sweet v. Taylor, 178 F. Supp. 456 (D. Kan. 1959).
[42] Warren, *supra* note 5, at 10.
[43] *Id.*

Are the basic safeguards of the Bill of Rights applicable to courts-martial? In the United States, as late as 1911, it was quite generally denied by the executive branch of the government that the personal guarantees found in the United States Constitution were applicable to their men in uniform.[44] Subsequently, it has been acknowledged that some of the guarantees are applicable.[45] Since 1943, the judicial attitude of the federal courts towards the exercise of jurisdiction by courts-martial has become more parental, and some of the fundamental privileges of the man in uniform are being respected by the more enlightened jurists.[46]

Similarly, the United States Court of Military Appeals has followed the same pattern. Thus, in *United States v. Clay*,[47] the Court carefully avoided the issue of the applicability of the constitutional amendments to courts-martial. Some years thereafter, the Court, in *United States v. Jacoby*,[48] squarely met this issue and categorically held that "the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[49]

It is reasonably expected that this development would in some way influence the administration of our own military justice system.

II. ARTICLES OF HUMAN RIGHTS AND COUNTERPARTS

A. *MAIN PROVISIONS OF DUE PROCESS*

1. *General.*

On due process, article 3 of the Declaration provides: "Everyone has the right to life, liberty and the security of person." The counterpart of this article in our Constitution partly reads: "No person shall be deprived of life, liberty . . . without due process of law."[50] Another due process guarantee

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[44] SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 445 (1953).
[45] *Id.*
[46] *Id.*
[47] 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).
[48] 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
[49] 11 U.S.C.M.A. at 430, 29 C.M.R. at 246.
[50] PHIL. CONST. art. III, § 1, cl. 1.

of our Constitution provides: "No person shall be held to answer for a criminal offense without due process of law." [51]

At this point, it is timely to delve into the meaning of military due process. What due process of law is must be determined by the circumstances.[52] To those in the military, due process of law means the application of the procedure of the military law.[53] In this respect, the military law provides its own distinctive procedure to which the members of the armed forces must submit.[54] But the due process clause guarantees to them that the military procedure will be applied to them in a fundamentally fair way.[55]

For the protection of an accused, the Declaration proclaims the following standards:

> Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[56]

> Everyone is entitled in full equality to a fair and pubic hearing by an independent and impartial tribunal in the determination . . . of any criminal charge against him.[57]

The foregoing standards of due process in criminal proceedings which the Declaration outlines are more than sufficiently guaranteed in our fundamental law. Among the constitutional rights of an accused safeguarded in our Constitution are:[58]

(a) Presumption of innocence;

(b) Right to be heard by himself and counsel;

(c) Right to be informed of the nature and cause of the accusation against him;

(d) Right to a speedy and public trial;

(e) Confrontation of witnesses; and

(f) Compulsory process to secure the attendance of witnesses in his behalf.

Our Articles of War, on the other hand, has its own distinctive provisions for the protection of the rights of an accused

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[51] *Id.* cl. 15.

[52] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

[53] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); DeWar v. Hunter, 170 F.2d 993 (10th Cir. 1948), *cert. denied*, 337 U.S. 908 (1949).

[54] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944).

[55] Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946).

[56] UDHR art. 11, para. 1.

[57] UDHR art. 10.

[58] PHIL. CONST. art. III, § 1, cl. 17.

in military criminal proceedings. Accordingly, Article of War 30 imposes on the law member of a general court-martial (or the president of a special court-martial) the specific duty of advising the court before a vote is taken that:

(a) The accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond any reasonable doubt;

(b) If there is a reasonable doubt as to the *guilt* of the accused in the case being considered, the doubt shall be resolved in the accused's favor and he shall be acquitted;

(c) If there is a reasonable doubt as to the *degree of guilt*, the finding must be in a lower degree as to which there is no such doubt; and

(d) The burden of proof to establish the guilt of the accused is upon the government.

2. *Nature and Cause of Accusation.*

A fundamental right accorded by the Philippine Articles of War to an accused is the right to be informed of the nature and cause of the accusation against him. Article of War 71 directs that, when a person is held for a trial by general court-martial, the commanding officer will forward the charges to the officer exercising general court-martial jurisdiction and will furnish the accused a copy of such charges. Likewise, this Article provides that the trial judge advocate will cause to be served upon the accused a copy of the charge upon which trial is to be had, and a failure so to serve such charges will be a ground for a continuance unless the trial be had on charges already furnished the accused.

The rights of an accused to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic elements of due process in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[39]

3. *Counsel.*

Cognizant that the right to counsel is essential to fundamental fairness, our Congress guaranteed this right in Articles of War 11 and 17. Under the former, the authority appointing the court appoints a trial judge advocate and a defense counsel for each general or special court-martial and, when necessary,

[39] *In re* Oliver, 333 U.S. 257 (1947).

one or more assistant trial judge advocates and one or more assistant defense counsel for a general court-martial. The latter Article endows the accused with the right to be represented in his defense before the court by counsel of his own selection, civilian counsel if he so provides, or military if such counsel is reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article of War 11.

This right to counsel includes the right of counsel to an opportunity to prepare the defense and to acquaint himself with the facts or law of the case.[80] Coupled with this right to prepare for one's defense is the accused's right to object in time of peace to trial by a general court-martial within a period of five days subsequent to the service of charges against him.[81] This right to counsel, which is one of the protective safeguards deemed necessary to insure fundamental human rights to life and liberty, is so important that violation thereof may result in voiding a judgment of conviction on the ground of lack of jurisdiction.[82] Of interest to students of military justice is the case of *Shapiro v. United States*.[83] In this case, the plaintiff (accused) was put to the necessity, at 12:40 p.m., of securing other counsel (nonlawyers) to represent him in a trial to convene at 2:00 p.m. at a place 35 to 40 miles away from the place where the charges had been served on plaintiff. Denying plaintiff's motion for a continuance of seven days, the general court-martial proceeded with the trial, convicted him at 5:30 that afternoon, and sentenced him to dismissal, which was later affirmed. Condemning this process, the court said:

> A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court,—who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice.[84]

The court took occasion to point out that the fifth (due process) and sixth (assistance of counsel) amendments to the United States Constitution apply as well to military tribunals as to civilian ones.

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[80] *See* Powell v. State of Alabama, 287 U.S. 45 (1932).
[81] AW 71, PA.
[82] *See* Johnson v. Zerbst, 304 U.S. 458 (1938).
[83] 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).
[84] *Id.* at 653, 69 F. Supp. at 207.

Similarly, our Supreme Court also held that a constitutional provision extending to the accused the right to be represented by counsel in any trial court whatever applies to a court-martial and gives the accused the undeniable right to defend by counsel, and a court-martial has no power to refuse an attorney the right to appear before it if he is properly licensed to practice in the courts of the country.[65]

The fact that an accused is denied counsel at the preliminary investigation required by our Article of War 71 is not, however, a violation of clause 17, section 1, article III of the Philippine Constitution, which grants an accused in all criminal prosecutions the right to be heard by himself and counsel, since the preliminary investigation is not a "criminal prosecution" within the purview of this constitutional provision.[66]

4. *Speedy Trial.*

The right to a speedy trial assumes great importance in the military, where the right to bail does not exist. In *Ex parte Milligan*,[67] the Supreme Court of the United States observed that the discipline necessary to the efficiency of the Army required swifter modes of trial than are furnished by the common law courts.

The right to a speedy trial is recognized by our Article of War 71, which requires that, when a person subject to military law is placed in arrest or confinement, immediate steps shall be taken to try the person accused or to dismiss the charge and release him. The Article further requires that, if practicable, the general court-martial charges shall be forwarded to the appointing authority within eight days after the accused is arrested or confined; if the same is not practicable, he shall report to the superior authority the reasons for delay. It is undeniably to forestall unavoidable situations that the requirement in Article of War 71 is not absolute and should be fulfilled only "if practicable." [68]

The right to a speedy trial is necessarily relative, consistent

[65] Marcos v. Chief of Staff, 89 Phil. 246 (1951).
[66] *See* Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943).
[67] 71 U.S. (4 Wall.) 2 (1866).
[68] Reyes v. Crisologo, 75 Phil. 225 (1945); Burns v. Harris, 340 F.2d 383 (8th Cir. 1965).

with reasonable delays.[69] The importance of this right is underscored by the fact that an officer who is guilty of negligence or omission resulting in unnecessary delay may be held accountable therefor under Article of War 71.[70]

5. *Public Trial.*

The right to a public trial is not expressly covered by our Articles of War. However, our *Manual for Courts-Martial* provides that, subject to the directions of the appointing authority, a court-martial is authorized either to exclude spectators altogether or to limit their number.[71] In the absence of a good reason, however (*e.g.*, where testimony as to obscene matters is expected), a court-martial sits with doors open to the public.[72] Where secrecy is necessary in wartime, the problem is solved by deferring trial until after the termination of hostilities,[73] and invoking the extension of the statute of limitations provided for that purpose.[74]

6. *Confrontation.*

As to the accused's right to confrontation in court-martial proceedings, the same is apparently abridged by our Article of War 25, which, under certain conditions, authorizes reading into evidence before military courts any authenticated deposition taken upon reasonable notice to the prosecution. On this score, however, the accused's right to be confronted with witnesses against him is limited to the *guaranty of opportunity* to cross-examine them,[75] and it does not extend to the personal appearance in court of such witnesses as are not obtainable.[76] In dealing with depositions of deceased or absent witnesses, the courts have almost unanimously received them, when offered against the accused in criminal prosecutions, as not being obnoxious to the constitutional provision, if the right

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[69] Gunabe v. Director of Prisons, 77 Phil. 993 (1947); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960); United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956); Kronberg v. Hale, 180 F.2d 128 (9th Cir. 1950); Kronberg v. White, 84 F. Supp. 392 (N.D. Cal. 1949); *Ex parte* Webb, 84 F. Supp. 568 (D. Hawaii 1949).

[70] Reyes v. Crisologo, 75 Phil. 225 (1945).

[71] MCM, PA § 49*e*. *See* United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

[72] *Id.*

[73] SNEDEKER, *supra* note 44, at 451.

[74] *Id. See* AW 38, PA.

[75] 5 WIGMORE, EVIDENCE §§ 1371, 1395 (3d ed. 1940).

[76] *Id.* § 1396.

of cross-examination has been satisfied." Philippine Article of War 25, as in the United States court-martial practice and tradition, excludes depositions in *capital* offenses when offered by the prosecution.

7. *Compulsory Process.*

The right to have compulsory process issued to obtain the attendance of witnesses in his behalf is secured for the accused by our Articles of War 22 (process to obtain witnesses) and 23 (contempt for refusal to appear or testify).

8. *Impartiality.*

Among the Articles designed to achieve impartiality in our court-martial system are Articles of War 4, 8, 9, 19, 11, and 88–A.

Under Article of War 4, the convening authority, when appointing courts-martial, details as members thereof those personnel of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament.

Pursuant to Articles of War 8 and 9, a general or special court-martial is appointed by a superior competent authority when the commander or commanding officer who is normally authorized to convene such court is the accuser or the prosecutor of the person or persons to be tried.

Members of a general or special court-martial are, under their statutory oath, required to "duly administer justice, without partiality, favor, or affection." [78]

Article of War 11 prohibits any officer who has acted in any case as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel from subsequently acting as staff judge advocate to the reviewing or confirming authority upon the same case.

Under Article of War 88–A, commanding officers or any authority appointing a court-martial are forbidden, under pain of penalty, to censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility.

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[77] *Id.* § 1398.
[78] AW 19, PA.

Also, pursuant to our Article of War 88–A, any person subject to military law who attempts to coerce or unlawfully influence the action of a court-martial or any member thereof in reaching the findings or sentence in any case, or the action of any appointing, reviewing, or confirming authority with respect to his judicial act, shall be punished as a court-martial may direct.

B. *EX POST FACTO LAW*

Paragraph 2 of article 11 of the Declaration provides:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The foregoing standard has long been embedded in our constitutional system. Our Constitution prohibits the enactment of an ex post facto lay.[79] The principle that the prohibition of ex post facto laws applied only to criminal, not civil, matters[80] covers the court-martial system.[81]

C. *ARREST OR CONFINEMENT*

Article 9 of the Declaration proclaims this standard: "No one shall be subjected to arbitrary arrest, detention or exile."

Security of one's person is protected by our Constitution, not only by the general due process clause but also by some specific provisions. Thus, clause 3, section 1, article III prohibits, among other things, the violation of the people's rights to be secure in their persons against unreasonable seizure.

Our Constitution likewise ordains that the privilege of the writ of habeas corpus, which is an effective remedy for any violation of the rights described above,[82] shall not be suspended except in certain specific events affecting the security of the state.[83]

On the other hand, Article of War 70 provides that any person subject to military law charged with a *crime* or with a

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[79] PHIL. CONST. art. III, § 1, cl. 11.
[80] Ongsiako v. Gamboa, 86 Phil. 50 (1950).
[81] NCM 356, Redden, 17 C.M.R. 492 (1954); CGCM S–20067, Perry, 17 C.M.R. 548 (1954); ACM S–1446, Ackerman, 1 C.M.R. 621 (1951).
[82] Ognir v. Director of Prisons, 80 Phil. 401 (1948).
[83] PHIL. CONST. art. III, § 1, cl. 14.

serious offense under the Articles of War may be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement."[84]

Of particular interest to observers of military justice in this regard is the case of *Wales v. Whitney*.[85] This case recognizes that a person in the military service is always more or less subject to his movement by the very necessity of military rule and subordination.

D. *CRUEL AND UNUSUAL PUNISHMENT*

As to treatment or punishment of an individual, article 5 of the Declaration provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

In this area, our Constitution[86] prohibits the infliction of cruel and unusual punishment.

Article of War 40, on the other hand, similarly provides that cruel and unusual punishments of every kind are prohibited.

The foregoing provisions express the rule that the accused in a free community, even after conviction, is treated as a human being who shall not be subjected to a kind of punishment shocking to public sentiment.

The penalty of denationalization as a cruel and unusual punishment is involved in *Trop v. Dulles*.[87] In this case, the United States Supreme Court set aside a federal law providing for loss of citizenship of any convicted deserter of the armed forces in wartime on the ground that such denationalization constitutes cruel and unusual punishment. About 7,000 men who had served in the United States Army alone in World War II were rendered stateless by the vacated federal law.[88]

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[84] *See* MCM, PA, § 19, as to deferment, basis, and minimum character and duration of arrest or confinement; *see also* Reyes v. Crisologo, 75 Phil. 225 (1945), where petitioner's confinement could not be said to be without due process of law when military authorities had strictly complied with the procedural requirements of AW 71, PA.

[85] 114 U.S. 564 (1885).

[86] PHIL. CONST. art. III, § 1, cl. 19. For examples of cruel and unusual punishments, *see* MCM, PA, § 102. *See also* United States v. Wappler, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953), regarding the cruel and unusual nature of the penalty of confinement on bread and water.

[87] 356 U.S. 86 (1958).

[88] Warren, *The Bill of Rights and the Military*, AF JAG Bull., May–June 1962, p. 12.

Incidentally, such federal law is likewise not in consonance with Article 15 of the Declaration, which provides that no one shall be arbitrarily deprived of his nationality.

In this jurisdiction, Commonwealth Act No. 68 contains similar provisions as did the United States federal law. It may be noted that Turkey and the Philippines are the only two nations, out of 84, which impose such penalty for desertion.[89]

E. *REMEDIES*

Article 8 of the Declaration provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

In our legal system, there are sufficient remedies for the protection, preservation, and vindication of our basic civil rights.

1. *Articles of War.*

Under the Philippine Articles of War, violations of fundamental rights of an accused or errors affecting his substantial rights may cause the reviewing or confirming authorities to reverse or set aside court-martial proceedings. Articles of War 36, 46, 48, 50, and 50–A provide the statutory bases for the application of this remedy. Correction of errors committed by a court-martial not affecting its jurisdiction is within the competence of military authorities and not the civilian courts.[90]

In passing, it should be noted that there also exists the Article of War 120 remedy, by which an aggrieved member of the armed forces may, through channels, seek redress of his grievances to his military superiors.[91]

Also, courts-martial may take cognizance of certain violations of the fundamental rights of an accused. Thus, any officer who, in violation of the rule on speedy trial, is responsible for unnecessary delay in carrying a case to a final conclusion may be punished as a court-martial may direct.[92]

Likewise, any commanding officer who, in violation of the rule on impartiality, censures, reprimands, or admonishes a

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[89] 2 TANADA & CARREON, POLITICAL LAW OF THE PHILIPPINES 289 (1962).
[90] Crouch v. United States, 13 F.2d 348 (9th Cir. 1926).
[91] De la Paz v. Alcaraz, GR No. L–8551, 18 May 1956, 52 OG 3037.
[92] AW 71, PA.

court-martial or any member thereof with respect to the findings or sentence adjudged by the court, or with respect to any other exercise by such court or member thereof of its or his judicial responsibility, may be punished as a court-martial may direct."[93]

Other similar situations abound in our court-martial system, but the foregoing are believed sufficient for illustration purposes.

2. *Civilian Law.*

Under the civilian law, the Revised Penal Code[94] and our New Civil Code[95] set forth the criminal and the civil liability, respectively, for violations of fundamental rights.

Crimes against fundamental laws are punishable under the Revised Penal Code under articles 124 through 133. Other violations of fundamental rights are punished under some other articles of this Code.

On the other hand, pursuant to article 32 of the Civil Code, any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates, or in any manner impedes or impairs any of the enumerated civil rights and liberties of another may be liable to the latter for damages. Article 32 of the Civil Code further provides that, in any of the cases referred to therein, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages and for other relief. The indemnity under the law covers moral, as well as exemplary, damages. The responsibility set forth in the above article, pursuant to its provisions, is not, however, demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

3. *Habeas Corpus.*

We now turn to cases involving deprivation of liberty. The protective remedy in our law in such cases is the writ of habeas corpus.[96] This writ is considered the best and only sufficient defense of personal freedom.[97] In fact, it was pur-

[93] AW 88–A, PA.

[94] Act No. 3815, as amended.

[95] RA No. 386.

[96] PHIL. CONST. art. III, § 1, cl. 14; Rule 102, Revised Rules of Court of the Philippines [hereafter cited as PHIL. REV. RULES].

[97] Ognir v. Director of Prisons, 80 Phil. 401 (1948); Payomo v. Floyd, 42 Phil. 788 (1922); Villavicencio v. Lukban, 39 Phil. 778 (1919).

posely devised as a speedy and effectual remedy to relieve persons from unlawful restraint."[98]

As earlier stated, the scope of inquiry on a writ of habeas corpus extends to an examination of the military proceedings to determine whether basic constitutional guarantees have been violated.[99] Accordingly, where it appears from a court-martial record that military law was applied fairly, that the accused was not denied his substantial rights which could deprive the court-martial of jurisdiction, and that the evidence was sufficient to support conviction, a petition for habeas corpus is to be denied.[100]

III. OTHER RELATED RIGHTS UNDER THE PHILIPPINE CONSTITUTION AND ARTICLES OF WAR

A. *DOUBLE JEOPARDY PROTECTION*

Our Constitution[101] provides that "No person shall be twice put in jeopardy of punishment for the same offense." On the other hand, Article of War 39 provides in part that "No person shall, without his consent, be tried a second time for the same offense."

The question whether the decision of a military court constitutes a bar to further prosecution for the same offense in the civilian courts was raised in *Crisologo v. People of the Philippines.*[102] The court in this case restated the rule that, where an act transgresses *both* civilian and military authority, a conviction or an acquittal in a civilian court cannot be pleaded as a bar to a prosecution in the military court, and vice versa.[103] The court, however, qualifyingly stated that the rule "is strictly limited to the case of a single act which infringes both the civilian and the military law in such a manner

[98] Villavicencio v. Lukban, 39 Phil 778 (1919); Johnson v. Zerbst, 304 U.S. 458 (1938).

[99] Burns v. Wilson, 346 U.S. 137 (1953).

[100] Brown v. Sanford, 170 F.2d 344 (5th Cir. 1948).

[101] PHIL. CONST. art. III, § 1, cl. 20.

[102] No. L-6277, 26 Feb. 1954, 50 OG 1021.

[103] *See In re* Stubbs, 133 Fed. 1012 (C.C.D. Wash. 1905); *see also* United States *ex rel.* Pasela v. Fenno, 76 F. Supp. 203 (D. Conn. 1947), *aff'd* 167 F.2d 593 (2d Cir.), *cert. granted*, 334 U.S. 857, *dismissed per stipulation*, 335 U.S. 806 (1948), holding that a person subject to military law who commits an offense of both a military and a civilian nature, and who has been tried and acquitted or convicted by a civilian court for the civilian offense involved, may be tried by court-martial for the military offense.

as to constitute two distinct offenses, one of which is within the cognizance of the military courts and the other a subject of a civil jurisdiction." Citing *Grafton v. United States*[104] and *United States v. Tubig*,[105] the court held that, where the offense (treason) of which the accused was convicted by the proper military court and the one charged in the civilian court are the same, the conviction by court-martial should be a bar to his further prosecution therefor in the civilian court.

Where the court-martial had no jurisdiction, however, jeopardy could not have attached, and the accused could be tried in the civilian court.[106] To constitute a bar to a second trial for the same offense under the double jeopardy rule, jeopardy attaches after the court has begun to hear the evidence, although there are exceptions to this rule.[107]

B. *PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES*

Our Constitution guarantees: "The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."[108]

Neither our Articles of War nor our *Manual for Courts-Martial* specifically mentions this protection against unreasonable searches and seizures. This omission, however, should not be construed to mean that the constitutional guaranty is entirely inapplicable to our military system. It has been held that the protection against unreasonable searches and seizures afforded by the United States Constitution is available to all citizens, at all times and places, civilian or military, within the jurisdiction of the country.[109] Moreover, in the absence of positive military regulations, we look to the general usage of the military service as part of our law on the subject.[110] After all,

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[104] 11 Phil. 776 (1907), *rev'd*, 206 U.S. 333 (1907).

[105] 3 Phil. 244 (1904).

[106] People v. Acierto, Nos. L–2708 & L–3355–60, 30 Jan. 1953, 49 OG 518.

[107] United States v. Tateo, 377 U.S. 463 (1964); Wade v. Hunter, 336 U.S. 844 (1949); 169 F.2d 973 (10th Cir. 1948) *aff'g*.

[108] PHIL. CONST. art. III, § 1, cl. 3. As to the remedial law on search and seizure, *see* PHIL. REV. RULE 126.

[109] NCM 58–00130, Hillan, 26 C.M.R. 771, 786 (1958), citing United States v. Kidd, 153 F. Supp. 605 (W.D. La. 1957).

[110] Law as established by custom has been given legislative sanction by AW 19, PA (oath).

usage or custom is a source of law in all governments.[111] Thus, the authority of a commanding officer to make or order an inspection or search of a member of his command in a place *under military control* has long been recognized as indispensable to the maintenance of good order and discipline in the command.[112] The basis for this rule of discretion lies in the reason that, since such officer has been vested with unusual responsibilities regarding personnel, property, and materiel, it is necessary that he be given commensurate power to discharge that responsibility.[113]

It should also be observed in this regard that inspections of military personnel entering or leaving certain areas—as those conducted by a commander in furtherance of the security of his command—are not deemed to be "searches" but are considered wholly administrative or preventive in nature and are within the commander's inherent powers.[114]

In determining the illegality of a search, the basic question in both civilian and military procedures is whether the search complained of was unreasonable. This depends upon the circumstances of each case and must be determined in each case.[115] Due to the peculiarities of the military service, the term "unreasonable" may have a different meaning in military law than in the civilian sphere.[116]

The exercise of the power to order searches is not, however, unlimited and must be founded upon probable cause.[117] Although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same.[118]

Under the provisions of the *Manual for Courts-Martial, United States, 1951*,[119] articles obtained as a result of an unlawful

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[111] United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832); *see* PHIL. CIVIL CODE arts. 11 & 12.

[112] ACM 6172, Turks, 9 C.M.R. 641 (1953), and cases cited therein.

[113] United States v. Doyle, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952).

[114] United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

[115] United States v. Ball, 8 U.S.C.M.A. 25, 23 C.M.R. 249 (1957); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

[116] United States v. Doyle, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); United States v. Rhodes, 3 U.S.M.C.A. 73, 11 C.M.R. 73 (1953).

[117] United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

[118] United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

[119] Hereafter cited as MCM, US.

search are inadmissible in evidence.[120] This doctrine used to be the rule in this jurisdiction.[121] In *Monacado v. People's Court*,[122] however, a closely divided court held that articles illegally seized were admissible evidence. This case appears to have abrogated the remedial sanction (exclusionary rule) against violations of the constitutional protection against unreasonable searches and seizures. Since the decision of this case is not so decisive as to constitute a settled rule, the development of Philippine law and jurisprudence on the matter merits watchful attention.

C. *COMPULSORY SELF-INCRIMINATION*

Our Constitution commands that "No person shall be compelled to be a witness against himself." [123]

In turn, our Article of War 24 in pertinent part provides: "No witness . . . shall be compelled to incriminate himself . . . ."

To emphasize the importance of this right, our *Manual for Courts-Martial* expressly states that the "principle" embodied in the foregoing constitutional provision applies to trials by courts-martial and is not limited to the person on trial but extends to any person who may be called as a witness.[124]

Our Supreme Court, in *People v. Carillo*,[125] interpreted the above constitutional and Article of War provisions in relation to the admissibility of a voluntary confession in evidence. In this case the Court held that the accused's conviction based on a voluntary extrajudicial statement in no way violates the constitutional guarantee against self-incrimination and that what the constitutional inhibition seeks to protect is compulsory disclosure of incriminating facts. As to Article of War 24, the Court observed that this Article does not prohibit the taking of incriminating statements of witnesses who prefer to

[120] MCM, U.S. ¶ 152.

[121] Alvarez v. Court of First Instance, 64 Phil. 33 (1937).

[122] 80 Phil. 1 (1948). *See* Medina v. Collector of Internal Revenue, GR No. L-15113, 28 Jan. 1961, holding that illegally obtained documents are admissible in evidence, if they are found to be competent and relevant to the case. *See also* RA No. 4200 prohibiting and penalizing wire tapping and other related violations of the privacy of communication, and regulating the use of records taken in the course thereof as evidence in any civilian criminal investigation or trial of certain offenses against national security or crimes against public order.

[123] PHIL. CONST. art III, § 1, cl. 18.

[124] MCM, PA. § 122*b*.

[125] 77 Phil. 572 (1946).

give them voluntarily, uninfluenced by fear of punishment or by promises of leniency or reward.

Compulsion may be either physical or mental; but, to establish a violation of the right against self-incrimination, the accused must show some act which denies him the right to free choice.[136]

Although our Manual makes reference only to trials by courts-martial in defining the applicability of the "principle" embodied in the aforequoted constitutional provision, it is likely the privilege against self-incrimination applies to all proceedings wherein the defendant is acting as a witness in any investigation that requires him to give testimony that might tend to show him guilty of a crime.[137]

D. *COMPULSORY SELF-DEGRADATION*

Article of War 24 accords to witnesses the additional protection against compulsory self-degradation. Pursuant to this statutory safeguard, no witness may be compelled to answer any question not material to the issue when such answer may tend to degrade him. Our Manual emphasizes the extent of this privilege by stating that it applies only to matters that are not material to the issue.[138]

E. *EXCESSIVE FINES*

The imposition of excessive fines is prohibited by our Constitution.[139] Inasmuch as a fine may be imposed as a form of punishment pursuant to certain Articles of War,[140] the constitutional inhibition against the imposition of excessive fines applies with equal force in court-martial proceedings as in criminal proceedings before the civilian courts.

F. *OTHER SUBSTANTIAL RIGHTS UNDER THE ARTICLES OF WAR*

Other substantial rights of the accused under our Articles of War, not heretofore treated, which strike at the very core of military due process[141] include:

[136] United States v. Collier, 1 U.S.C.M.A. 575, 5 C.M.R. 3 (1952).
[137] *See* United States v. Welch, 1 U.S.C.M.A. 402, 3 C.M.R. 136 (1952).
[138] MCM, PA § 122*a*. *See* NCM 127, Thacker, 4 C.M.R. 432 (1952).
[139] PHIL. CONST. art. III, § 1, cl. 19.
[140] AW 81, PA; AW 95, PA; and AW 94, PA (in cases of offenses of a civil nature punishable by fine under the corresponding penal laws).
[141] *See* United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

(1) Right to challenge members of the court for cause or peremptorily;[133]

(2) Right to have a specified number of members compose general and special courts-martial;[134]

(3) Right to be found guilty of an offense only when a designated number of members concur in a finding to that effect;[135]

(4) Right to be sentenced only when a certain number of members vote in the affirmative;[136] and

(5) Right to have an appellate review in certain cases.[137]

G. *BAIL*

The constitutional and statutory right to bail[138] is not available to members of the armed forces in the military criminal proceedings. There is no law extending this right to them. Therefore, no court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail.[139] Bail is wholly unknown to the military law and practice, and a civilian court cannot grant bail in a military case.[139]

Truly, the peculiarities of the service do not warrant the extension of this right to the men in uniform. By its very nature and mission, the military is entitled to the custody, subordination, and control of its soldiers. The granting of the right to bail to military personnel in court-martial cases, whether in war or in peace, would undoubtedly imperil the efficiency or the very existence of the armed forces itself. In this respect, national security is paramount over the soldier's individual freedom.

H. *INVOLUNTARY SERVITUDE*

Our Constitution ordains that "No involuntary servitude in any form shall exist except as a punishment for crime whereof the party shall have been duly convicted." [140]

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[133] AW 18, PA.
[134] AW 5, PA; AW 6, PA; and AW 4, PA.
[135] AW 42, PA.
[135] *Id.*
[136] AW 50, PA; AW 47, PA; and AW 45, PA.
[137] PHIL. CONST. art. III, § 1, cl. 16; PHIL. REV. RULE 114.
[138] DAVIS, MILITARY LAW OF THE UNITED STATES 63 n.2 (3d ed. 1913).
[139] *Id.*
[140] PHIL. CONST. art. III, § 1, cl. 13.

A comparable provision of the United States Constitution [141] was invoked in *Story v. Perkins*,[142] where the constitutionality of the Selective Service Act was questioned. The petitioner in this case was imprisoned for his failure to register for selective service. He contended that the Selective Service Act was void, alleging that it contravened the involuntary servitude clause of the thirteenth amendment. In rejecting his contention, the court said:

> To agree to this contention we must conclude that a soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill, and courage is and must be committed the task of maintaining the very existence of the nation and all that its people hold dear.[143]

I. *JUDICIAL REVIEW OF DEATH PENALTIES*

The Philippine Constitution provides that the Supreme Court may not be deprived of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in all criminal cases in which the penalty imposed is death or life imprisonment.[144]

Implementing this constitutional precept, the Judiciary Act of 1948 [145] lodged upon the Supreme Court the *exclusive* jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, final judgments of inferior courts in all criminal cases involving offenses for which the penalty imposed is death or life imprisonment.

On the other hand, the Rules of Court direct that the records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the Supreme Court for review and judgment as law and justice dictates.[146]

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[141] U.S. CONST. amend. XIII, § 1.

[142] 243 Fed. 97 (S.D. Ga. 1917), *aff'd sub. nom.* Jones v. Perkins, 245 U.S. 390 (1918). In Arver v. United States, 245 U.S. 366 (1918), the United States Supreme Court held that the exaction by Congress of enforced military duty from the sitizens, as done by the Act of 18 May 1917, does not render that statute repugnant to the thirteenth amendment to the U.S. Constitution as imposing involuntary servitude.

[143] 243 Fed. at 998.

[144] PHIL. CONST. art. VIII, § 2, cl. 4.

[145] RA No. 296, § 17.

[146] PHIL. REV. RULE 122.

Does the above constitutional requirement, together with its implementing statute and rule, apply in court-martial cases? As earlier noted,[147] this question was answered in the negative in *Ruffy v. Chief of Staff*.[148] The petitioners in this case were convicted by a general court-martial of murder in violation of Article of War 93, which provides that any person subject to military law who commits murder in time of war shall suffer death or imprisonment for life, as a court-martial may direct. It was contended that, since "no review is provided by law to be made by the Supreme Court, irrespective of whether the punishment is for life-imprisonment or death," that Article of War contravened the constitutional mandate that the Supreme Court should not be deprived of its original jurisdiction over all criminal cases in which the penalty imposed is death or life imprisonment. Holding the petitioners in error, the Supreme Court discussed the nature of courts-martial and concluded that they are agencies of executive character and not a portion of the judiciary for the purpose of the constitutional provision in question.

IV. CONCLUSION

A. *PROTECTION OF HUMAN RIGHTS*

In *Ex parte Milligan*,[149] Mr. Justice Davis, delivering the opinion of the Court, said:

> By the protection of the aw human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.[150]

We in the Armed Forces of the Philippines are fortunate in the sense that fundamental human rights are legally safeguarded within the military. In the light of our traditions and national conscience, that protection will certainly be strengthened, not weakened, in the course of time. In fact these rights, well recognized as fundamental in a free society, have been ingrained in our constitutional system long before faith in them was reaffirmed in the Preamble of the United Nations Charter.

We may safely conclude that basic human rights, as they affect persons subject to military law, are substantially secured and protected within our present military justice system. It is said that military courts have the same responsibilities as the

[147] *See* note 20 *supra* and accompanying text.
[148] 75 Phil. 875 (1946).
[149] 71 U.S. (4 Wall.) 2 (1866).
[150] *Id.* at 119.

civilian courts to protect a person from a violation of his constitutional rights.[151] In the discharge of these responsibilities, our courts-martial have been zealously vigilant against any infringement of these rights.

All this notwithstanding, there still exists much room for expansion of human rights in our military criminal law. Any step towards this end calls for a revision of our present Articles of War. And, as an excellent guide for us in the attainment of this desired objective, the progressive trend in the United States and England relating to this area may be seriously considered.

B. *TREND*

The system of military justice first established in the United States, which was modeled for the most part on the pre-Revolutionary War system of England based on the old Roman Code, has evolved from a system identified largely as the disciplinary tool of the commander into the elaborate judicial process that it has become today.[152] Congress in 1951 enacted the *Uniform Code of Military Justice* and established the Court of Military Appeals as a sort of civilian "Supreme Court" of the military. The Code represents a diligent effort by Congress to insure that military justice is administered in accord with the demands of due process.[153]

The development of military justice within the United States Army was paralleled by a strikingly similar movement in England.[154] The British, also in 1951, superimposed a new civilian tribunal over their court-martial system to review the findings of courts-martial.[155] In England, The Judge Advocate General and his reviewing functions have been placed completely outside the armed services.[156]

In our armed forces, the trend, while slow, leads to the expanding field of due process designed to benefit accused military personnel. Illustrative of this trend are the 1948 and 1950 amendments to our Articles of War.

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[151] Burns v. Wilson, 346 U.S. 137 (1953).

[152] Judge Adv. Gen. School, U.S. Army, The Background of the Uniform Code of Military Justice 1 (rev. & abr. 1960).

[153] Warren, *The Bill of Rights and the Military*, AF JAG Bull., May–June 1962, p. 11.

[154] Judge Adv. Gen. School, U.S. Army, *supra* note 152.

[155] *Id.*

[156] *Id.*

C. *JAGS LEGISLATIVE PROGRAM*

To meet the imperative need of streamlining our military criminal law, including the military justice system, so as to make it more responsive to existing realities and conditions, The Judge Advocate General of the Philippine Armed Forces recently drafted the "Articles of Military Justice," [157] which would revise our present Articles of War. The proposed substantial changes are primarily intended to insure maximum justice within our military criminal system consistent with the requirements and maintenance of discipline, law and order, and the exercise of military functions within the armed forces.

Enactment of these proposed "Articles of Military Justice" into law would unquestionably be another achievement of the Judge Advocate General's Service in the cause of human rights.

[157] Part of the proposed NATIONAL DEFENSE CODE.

PRIVILEGED COMMUNICATION — THE PERSONAL PRIVILEGES*

By Major David A. Fontanella **

The author analyzes the law of privileged communication in the military, including its historical bases, and compares the military rules with those prevailing in civilian jurisdictions. He concludes that certain recommended changes to the Manual or the Code are desirable to bring the military law in this area in line with modern times.

I. INTRODUCTION

Very early one morning a Dallas Attorney received a telephone call from a client he was currently representing in a divorce action. In fact, the case had been tried the day before and he had secured a satisfactory property settlement. The attorney picked up the phone and the following conversation took place:

The appellant: "Hello, Jimmy, I went to the extremes."

The voice [the attorney] in Dallas: "What did you do?"

The appellant: "I just went to the extremes."

The voice in Dallas: "You got to tell me what you did before I can help."

The appellant: "Well, I killed her."

The voice in Dallas: "Who did you kill; the driver?"

The appellant: "No, I killed her."

The voice in Dallas: "Did you get rid of the weapon?"

The appellant: "No, I still got the weapon."

The voice in Dallas: "Get rid of the weapon and sit tight and

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** JAGC, U.S. Army; Judge Advocate, Fort Devens, Massachusetts; B.S., 1957, University of Connecticut; LL.B., 1964, University of Michigan; admitted to practice before the bars of the State of Connecticut and the United States Court of Military Appeals.

[1]Clark v. State, 159 Tex. Crim. 187, 190, 261 S.W.2d 339, 341 (1953).

> don't talk to anyone, and I will fly down in the morning." [1]

In the subsequent trial for murder of the caller's wife, this dialogue, which had been recorded by the telephone operator, was offered as prosecution evidence. The defense objected, contending that the dialogue was a privileged communication.

This case illustrates the conflict between the admission of valuable evidence, which a jury is competent to assess, and the protection of confidential communications between an attorney and his client, which is necessary to the adequate representation of a person accused of a serious crime. This strain between conflicting demands is not unlike that found in other personal privileges where societal needs obstruct the examination of all the facts necessary to a fair and complete determination of guilt or innocence.

The personal privileges to be examined in this article are the attorney-client privilege and the husband-wife privilege. The latter privilege necessitates a discussion of spousal incompetency. The scope of examination is limited generally to recent case law and statutory development. Criminal law is the focal point, because of its obvious application to the military and its more direct bearing upon the stresses of justification, although the civil docket is necessarily cited as background in several cases. Ethical considerations, as an extension of the privilege outside the courtroom, are discussed in relation to an attorney's duty and possible accessorial conduct. The *Clark* case is used to illustrate, *inter alia*, the morass in which courts find themselves when they fail to reconcile rules of application, justification, and ethical conduct.

One thought bears paramount consideration in the exploration of the rules governing privileges. These rules, unlike the exclusionary rules of hearsay or opinion, serve to prevent or hinder the search for truth, as cases are decided with less than all available evidence in deference to social policies of the community.

II. THE ATTORNEY-CLIENT PRIVILEGE

A. *HISTORY*

There are few rules of evidence in Anglo-American law which are as firmly rooted and as uniformly adjudicated as the client's

privilege of confidential communication in professional relations with his legal advisor.[2] It originated in 16th century England, and its foundation was the duty of a legal advisor to remain silent about his employer's business. Courts would not force counsel to breach this duty as a matter of honor,[3] even in the face of a statute which provided for compelling a witness to attend and testify.[4] In the 18th century, the foundation and policy for the present-day privilege evolved.[5] It became evident that the increasing complexity of society and the concomitant role of the attorney in the administration of justice and other personal affairs required an atmosphere of complete confidence and security from fear of disclosure. This was recognized as necessary to the attorney in his professional analysis of the case, because the withholding of any facts by his client might well hinder his representation in court. It was early realized that the harm in preventing public inquiry of these confidential facts was far less than the good done for the public interest in the administration of justice.

Today, the attorney-client privilege is found in all jurisdictions of the United States. As an indication of the strength of this venerable privilege, 16 states, including the six New England states, use common law as a basis, while the majority of the states have provided for it by statute.[6]

In regard to the privilege in the military, Colonel Winthrop comments:

> The rule under consideration is laid down by the authorities with reference of course to *civilian* legal advisors. But, in principle, it is equally applicable to the relations between the accused and *military* persons acting as their counsel on military trials, where professional counsel is often not attainable and resort is frequently had to the assistance of officers or soldiers in the conduct of the defence.[7] [Italics in original.]

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[2] *See generally* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

[3] WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) [hereafter cited as WIGMORE]. *See* 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 177–78. (1st ed. 1926) [hereafter cited as HOLDSWORTH].

[4] *See* HOLDSWORTH 185 (citing 5 Eliz., c. 9, § 12 (1562)).

[5] *See* HOLDSWORTH 202 (citing Dutchess of Kingston's case, 20 How. St. Tr. 586 (1776), where was laid to rest the idea that an attorney could remain silent as a matter of honor in the service of the family he represented).

[6] WIGMORE § 2292.

[7] WINTHROP, MILITARY LAW AND PRECEDENTS 331 (2d ed. rev. & enl. 1920 reprint) [hereafter cited as WINTHROP].

The *Manual for Courts-Martial, United States, 1951*,[8] which sets forth the present military rule, is consistent with this view.

B. *THE RELATIONSHIP*

When legal advice of any nature is sought from a legal advisor or attorney in his capacity as such, the confidential communications which ensue are, at the client's instance, permanently protected from disclosure by himself or his legal advisor, except when the protection is waived. This phrase, tailored to the military view, is taken from Professor Wigmore's popular statement of the rule.[9] The relationship is critical to the invocation of the privilege, and the threshhold communication necessary for its use in the military is sometimes changed under military law. Civilian practice requires a professionally qualified legal advisor,[10] although it is sufficient that the client reasonably believes he is an attorney, when in fact he is not.[11] Communications to administrative practitioners about legal matters are generally unprotected from disclosure.[12]

An attorney, for purposes of the privilege, is defined in military law as any military or civilian counsel appointed or engaged to represent an accused before a court-martial, at its review, or during the investigation of a charged offense.[13] This departure from the general tenets of the rule is made necessary by the nature of military tribunals and the wide use of nonlawyer counsel in inferior courts-martial.

There has been increased concern about the creation of the attorney-client relationship and its bearing upon effective counsel in the early stages of investigation and prosecution. No confidential relationship arises until the attorney has been accepted by the client.[14] Also, it is not created by the mere designation of an attorney as counsel by the convening author-

[8] Para. 151 [hereafter called the Manual and cited as MCM].

[9] *See* WIGMORE § 2292.

[10] *Id.* § 2300. Payment or agreement to pay a fee is not essential to the professional relationship. *See* Robinson v. United States, 144 F.2d 392 (6th Cir. 1944). And the privilege exists notwithstanding the fact that litigation is pending or contemplated.

[11] *See* Prichard v. United States, 181 F.2d 326 (6th Cir. 1950).

[12] *See, e.g.*, Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d (1952).

[13] *See* MCM ¶ 151*b*(2).

[14] *See* United States v. Slamski, 11 U.S.M.C.A. 74, 28 C.M.R. 298 (1959). The accused, a larceny suspect at an Air Police office, requested counsel and was visited by the Staff Judge Advocate (a major) in civilian clothes. The accused was not convinced of his identity and volunteered no informa-

ity.[15] However, the relationship may arise at the pretrial investigation,[16] at the taking of a deposition,[17] or during a legal assistance interview.[18] Whether the attorney-client relationship existed is a question of fact, and the opinion of the parties themselves is not conclusive on the issue. Formal appointment by the convening authority is no prerequisite for establishment of the privilege and, in at least one case, counsel's refusal to discuss the merits of the case did not bar its application.[19]

The constitutionally-guaranteed right to counsel has been held to prevent interception and exploitation of confidential communications between attorney and client by agents of the government.[20] A Navy board of review[21] extended the same protection to an uncharged suspect whose consultation with nonlawyer counsel was, unknown to both parties, surrepticiously recorded. It commented:

> [I]t is our opinion that there was a flagrant invasion of the rights of the accused when the official representatives of the Government caused a recording to be made of the confidential and privileged consultation between the accused and his counsel which requires us to invoke the doctrine of general prejudice. Such action on the part of the government investigators materially prejudiced the substantial rights of the accused to a fair trial in that there is a fair risk that the information gained from the illegally recorded consultation might have led to the search which resulted in the government obtaining [two damaging prosecution exhibits] . . . .[22]

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tion. The major explained to him his legal rights but made clear that he could not be his attorney. On the following day the accused visited him in his office, acknowledged his identity, and confessed. It was held that no attorney-client relationship existed and that the accused's statement was admissible at his trial.

[15] United States v. Brady, 8 U.S.C.M.A. 456, 24 C.M.R. 266 (1957).

[16] *See* United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955).

[17] United States v. Brady, 8 U.S.C.M.A. 456, 24 C.M.R. 266 (1957) (dictum).

[18] *See, e.g.*, United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955) (holding advice on marital status is privileged and cannot be disclosed even in face of a service regulation forbidding legal advice in such a situation); United States v. Turley, 8 U.S.C.M.A. 262, 24 C.M.R. 72 (1957) (holding, in a larceny case, an attorney-client relationship was created when accused had earlier consulted the trial counsel in his capacity as legal advisor, concerning pending board action and his pecuniary liability and that this precluded his cross-examining upon this information at trial).

[19] *See* ACM 17351, Chierichetti, 31 C.M.R. 524 (1961).

[20] *See* Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951) *cert. denied*, 342 U.S. 926 (1952). This principle was reaffirmed in Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), *cert, denied*, 349 U.S. 930 (1955).

[21] NCM 59-01255, Bennett, 28 C.M.R. 650 (1959).

[22] *Id.* at 656.

C. *CONFIDENTIALITY*

The keystone of the privilege is the requirement for confidentiality of intercourse between attorney and client. The strength of the argument for the privilege lies in the necessity for uninhibited and complete revelation by the client of all essential information without fear of compulsory or unauthorized disclosure by the attorney. Absent the privilege, the vulnerability of the intercourse to forced disclosure would render full confidence unattainable. The scope of communication would be restricted in an effort to avoid discussion of information which, if subject to compulsory disclosure, would jeopardize the accused. The constitutional right against self-incrimination and right to the assistance of counsel would be almost meaningless. The entire concept of a criminal trial as an adversary proceeding would be seriously shaken. Only the demonstrably innocent would have the fortitude to consult freely with counsel without subterfuge or evasion. In contrast, no such justification can be voiced for the requirement of confidentiality in the privilege for marital communications. Moreover, the bases for husband-wife incompetency—commonly called a privilege—do not even include confidentiality in its foundation.

The confidential relationship includes the necessary assistants to an attorney. Any limitation on his use of a secretary or any other assistant necessary to the administration of his client's case would cripple the privilege. The Manual provides for this in broad language which explains the dearth of cases.[33]

Professor Wigmore stresses the need for an intention that the communication be confidential and, unless a third party is an agent of the attorney or the client reasonably necessary to the function of either, no privilege arises from the intercourse.[34] Therefore, in *United States v. Kovel*,[35] confidentiality was maintained in communications made to an accountant in the employ of the client's attorney and incident to the client's obtaining legal advice from the attorney.

In the military courts, any doubts which may exist are resolved in favor of the accused. In *United States v. McCluskey*,[36]

[33] *See* MCM ¶ 151*b*(2).

[34] *See* WIGMORE § 2311.

[35] 296 F.2d 918 (2d Cir. 1961). However, in Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), *cert denied*, 338 U.S. 860 (1949), an accountant present at a conference was found not to be absolutely necessary to communications between attorney and client, and hence no privilege attached.

[36] 6 U.S.C.M.A. 543, 20 C.M.R. 261 (1955).

the adjutant of the accused's unit had been present at one of several legal assistance consultations in which the accused discussed his marital problems. Later, reviewing the accused's conviction for bigamy, the Court held that the legal assistance officer, who acted as trial counsel, was disqualified from taking any part in the prosecution because of his confidential relationship with the accused. Although it was argued that the presence of a third party destroyed the privilege, the Court pointed out that the adjutant had been present only at one interview and it would be presumed that any revelations by the accused came out at a confidential meeting. It also pointed out that the rule existed of necessity, not only for the purpose of circumventing the dishonest practitioner, but also to prevent the upright lawyer from faltering into a situation of conflicting duties.

There is no confidentiality extant when a client tells his attorney to propound certain questions to witnesses at a preliminary hearing,[37] nor can a confidential relationship be found where matters are communicated to an attorney with the purpose that they be communicated to others. This latter rule was expressed in *United States v. Winchester*,[38] where, in a general court-martial for larceny, the accused's counsel sought to withdraw because he believed certain testimony of the accused was inconsistent with what he had been told earlier. The Court found error in the defense counsel's open-court statement that the accused had committed perjury. However, it continued, counsel's statement without more could not be held a violation of the attorney-client privilege, where it appeared also that the accused had made a pretrial agreement with the convening authority and information upon which counsel based his belief of perjury may well have been communicated to him with the intention of negotiating this agreement. In such a situation, the communication would not be confidential and no privilege would attach.

Confidentiality provides a simple rule of thumb for the application of the privilege. Its breach by a third party, whether intentional or not, vitiates the privilege, unless it is related to the connivance of the attorney or his agent. The complex set of rules attending the privilege often obscures

[37] *See* Wilcoxon v. United States, 231 F.2d 384 (10th Cir. 1956), *cert. denied*, 351 U.S. 943 (1956).
[38] 12 U.S.C.M.A. 74, 30 C.M.R. 74 (1961).

this point and, more often, results in opinions which discuss justification rather than application. A case in point is *Clark v. State*,[30] to be subsequently discussed.

D. *SUBJECT MATTER OF THE COMMUNICATIONS*

Communications subject to the privilege against disclosure have been extended in both the military and civilian jurisdictions to include oral, written, or other perceptive acts arising from a confidential relationship in which the client seeks professional advice from his attorney.[31] The privilege covers not only communications made by the client to his attorney but also those from the attorney to his client in relation to a confidential matter.[32] The requirement for confidentiality has been manifested in several ways, and both military and civilian courts generally follow the same practice.

Communications by perceptive acts are confidential when they are incidental to the attorney's analysis of his client's problems. Thus, in a personal injury action, when the client limps into court and the lawyer is called as a witness, there would be no occasion to object on grounds of privilege to the question, "Did plaintiff limp into your office?" [33] However, if this plaintiff revealed a scar on his leg to his attorney in the confidence of his office, a privilege would attach and the attorney need not answer. Moreover, other facts not arising by way of the confidential relationship are generally not privileged, such as the fact of consultation with an attorney,[34] or the identity of his client.[35] Few such questions have arisen in the military.

However, a facet which has arisen in the military is the denial of privilege to a communication made outside the confidentiality of the attorney-client relationship. In *United States v. Marrelli*,[36] worthless checks issued by the accused but obtained by his attorney from persons other than the accused

[30] 159 Tex. Crim. 187, 261 S.W.2d 339 (1953); see text accompanying note 1 *supra*.

[31] MCM ¶ 151*a* expresses it rather vaguely by stating, "A privileged communication is a communication made as incident of a confidential relation which it is the public policy to protect."

[32] *See* Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

[33] *See* WIGMORE § 2306.

[34] *See id.* § 2313.

[35] *See* Colton v. United States, 306 F.2d 633 (2d Cir. 1962).

[36] 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954).

were held not communications subject to the privilege. Similarly, in *United States v. Buck*,[36] the attorney properly testified as a prosecution witness relative to a telephone call from an unknown party returning stolen goods which were the subject matter of the larceny offense. The information was procured from a third party outside the confidential relationship of attorney and client. Although the proponents for strictly limiting the privilege to communication between attorney and client would agree heartily with this result,[37] there are jurisdictions which have extended the privilege by statute well beyond this point. These jurisdictions make subject to the privilege any matters known to the attorney by reason of his relationship with his client.[38] It is safe to say, however, that the military and a majority of the civilian jurisdictions take a more conservative view of the privilege.[39]

It should be clear, then, that facts known by counsel before an attorney-client relationship existed would not be privileged. In *United States v. Gandy*,[40] such a determination was made, permitting testimony by the pretrial defense counsel to matters concerning the accused which he had learned prior to his appointment as defense counsel. The Court pointed out that an attorney may be examined like any other witness concerning a fact known to him before his employment. And, taking the more stringent majority rule of the civilian courts, it was pointed out that the privilege does not apply to information received by the attorney from other sources, although his client may have given him the same information.

Generally, any communication which may be reached in the hands of the client, including public or official records, is not confidential and may be reached in the hands of the attorney as well.[41] The privilege does not relieve an attorney from producing, under subpoena, a document which would be likewise

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[36] 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

[37] *See* McCORMICK, EVIDENCE 187 (1954) [hereafter cited as McCORMICK].

[38] WIGMORE § 2292, quotes Alabama, Georgia, and Louisiana statutes as following this principle.

[39] *See, e.g.*, Kerr v. Hofer, 347 Pa. 356, 32 A.2d 402 (1943), in which no privilege was upheld as to information concerning an accident obtained by a lawyer through sources other than his client; Hawley v. Hawley, 114 F.2d 745 (D.C. Cir. 1940), in which an attorney's knowledge of his client's handwriting gained during his employment was not privileged.

[40] 9 U.S.C.M.A. 355, 26 C.M.R. 135 (1958).

[41] *See* WIGMORE § 2307.

obtainable in his client's hands.[42] However, any summary made of these records by the attorney, or his work product, to the extent that they carry any expression made by him therein, are privileged.[43]

The communication, to be privileged, must be made during a relationship in which the client seeks bona fide legal advice. There is no privilege where the client uses the attorney's services in a nonlegal capacity or where in fact the communication is not necessary to the legal advice sought.[44] The military courts have construed this rather broadly, particularly in the area of legal assistance interviews, and matters only remotely related to a subsequent trial have been included within the privilege.[45]

E WAIVER—WHOSE PRIVILEGE IS IT?

The attorney-client privilege may be waived expressly (by consent) or impliedly (by conduct or by failure to make a timely objection). It is important to note that the privilege belongs to the client; it is by his objection that the testimony of his attorney, and of agents of his attorney who are parties to the confidential communication, is precluded from admission.[46] This is the rule common to civilian courts.[47] When an attorney is called upon to disclose confidential communications, he may claim the privilege for his client, and, moreover, it is his duty to invoke the privilege even after the professional relationship has ended.[48]

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[42] *See* Falson v. United States, 205 F.2d 734 (5th Cir. 1953). However, in United States v. Judson, 322 F.2d 460 (9th Cir. 1963), cancelled checks and bank statements given to an attorney by his client pending an income tax liability investigation, while not within the attorney-client privilege, were still not subject to subpoena by virtue of the privilege against self-incrimination.

[43] Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

[44] *See, e.g.*, Olender v. United States, 210 F.2d 795 (9th Cir. 1954), in which the client hired the attorney solely as an accountant; Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), in which the client deposited money with his attorney to be applied on a purchase of real estate.

[45] In ACM 13217, Kellum, 23 C.M.R. 882 (1957), the accused discussed his financial problems with a legal assistance officer. The board held that an attorney-client relationship had been created and that the consultation was privileged at the later trial for worthless check charges, although there had been no discussion of the charges at the original interview.

[46] *See* MCM ¶ 151*b*(2).

[47] *See, e.g.*, Robinson v. United States, 144 F.2d 392 (6th Cir. 1944).

[48] *See* Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

The client, by testifying himself, does not waive protection of the privilege as to what he has disclosed to his attorney.[49] He may, however, waive his privilege by testifying voluntarily to the content of the confidential consultation on direct examination.[50] In such circumstances, the attorney is not bound to silence. Illustratively, when the accused put in issue the exact nature of his former attorney's advice, in support of his motion to withdraw a plea of guilty, the attorney was permitted to give his version of the consultation.[51] Moreover, when the client attacks his attorney's professional competency or makes disparaging remarks about the nature of his defense, the privilege is waived by implication. In *United States v. Allen*,[52] the accused filed an affidavit alleging his defense counsel was aware of mitigating factors which he failed to present at trial. It was determined that a hearing should be conducted by a board of review upon the charge of incompetency to determine the truth of the allegations. Logically, it was held that the attorney could testify at the hearing to his confidential conversation with the accused. Once the accused raises the issue of breach of duty, the privilege ceases.[53]

At least one Air Force board of review decided that the government may likewise waive the privilege when a prosecutor subsequently represents the accused, at the latter's request.[54] The former prosecutor may represent the accused to the fullest extent, using whatever information he may have learned while acting for the government.

The charge of incompetency or acting adversely has been settled in civilian courts with a result not dissimilar to the military. In *United States v. Monti*,[55] the court held the accused had waived his privilege when he alleged in a motion to set aside a conviction that he had been coerced by his former counsel to plead guilty and had been misadvised as to the effect of that plea. The court could order such counsel to disclose all relevant facts. Furthermore, when the accused testifies as to

[49] *See* WIGMORE § 2327.
[50] *See* MCCORMICK 197.
[51] *See* Goo v. United States, 187 F.2d 62 (9th Cir.), *cert. denied*, 341 U.S. 916 (1951).
[52] 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957).
[53] ACM S–10728, Reynolds, 19 C.M.R. 850, *pet. denied*, 19 C.M.R. 413 (1955).
[54] *See* ACM 11107, Bell, 20 C.M.R. 804 (1955).
[55] 100 F. Supp. 209 (E.D.N.Y. 1951).

legal advice given him, he waives the privilege, and failure to call the former attorney raises the inference that the testimony of the attorney would be unfavorable, and there may be comment on this influence to the jury.[56]

Waiver of the privilege is based upon the confidentiality of the relationship. Thus, in any case where the confidential nature of the communication has been breached, the privilege is lost. It follows then that the privilege is waived when disclosure is made at a former trial, and at any time a public disclosure is made.[57]

F. *THIRD PARTIES—EAVESDROPPING*

The premise that the privilege is grounded on confidentiality is brought home with effect when the rules concerning disclosure to third parties are examined. When the basic confidential relationship is borne in mind, the harshness and seemingly paradoxical nature of the third party rules are mitigated. In both military and civilian courts, the presence of any third party other than a bona fide agent of the attorney or client destroys the privilege.

When communication is obviously open to perception by parties unrelated to it, there is no confidential relationship and no privilege. Conversation conducted where others may hear or correspondence open to the public, including official records and documents, is impliedly not intended to be confidential and no privilege obtains. The attorney, his client, or any third party may be compelled to testify in the absence of any other limiting principle of evidence.

The policy underlying the privilege protects from disclosure any intended confidential communication which, through the collusion of the recipient, is overheard by an outside party.[58] Thus, if the third party who overhead or saw the privileged communication, or who obtained the writing containing it, did so with the connivance of the attorney, the privilege would operate to silence the attorney and the third party.

The rules regarding an outside party, popularly called the eavesdropper, who overhears or sees a privileged communication,

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[56] McClanahan v. United States, 230 F.2d 919 (5th Cir.) *cert. denied*, 352 U.S. 824 (1956).
[57] *See* WIGMORE § 2328.
[58] *See* MCM ¶ 151*b*(2).

either by accident or design, generally do not change the duty of the privilege which exists between attorney and client. Since the communication was intended to be confidential, only the outside party may testify to what he heard or saw.[59] But, in the *Bennett* case,[60] it was held that agents who were eavesdropping upon a confidential attorney-client interview by means of a "bugged" interrogation room, *without* the connivance of the attorney, were prohibited from disclosing the information, or even using it as a lead to derivative evidence. Therefore, outside parties, other than law enforcement agents, who overhear or see any form of communication between attorney and client may be compelled to testify concerning its contents.

The Manual provides for these rules, except for *Bennett*, in a rather discontinuous fashion made necessary by incorporating all the personal privileges under one heading. It does make clear, however, that any breach of confidentiality resulting from unlawful search and seizure does not vitiate the privilege.[61] Moreover, it points out that operators of radio and wire communication facilities are legitimate eavesdroppers and may be compelled to testify.[62] This conclusion logically follows any breach of confidentiality, and while the rule may be superfluous, it is a helpful comment upon the law. In the *Clark* case,[63] which introduced the general problems of this privilege, the court had great difficulty in seeking a way to avoid the attorney-client privilege. It discussed ethical problems, justification for the privilege, and the law of accessorial conduct. It could have resolved the issue by a simple consideration of confidentiality, since the privilege did not preclude the testimony of a telephone operator who had overheard the conversation.

It appears then that the eavesdropper holds a singular position in respect to the privilege, unless he is working for the government. And, it is surprising to note that several of the leading proponents for strict construction of the rules are reluctant to accept this.[64] The advent of more sophisticated electronic eavesdropping equipment turns this peculiarity in the privilege into a distinct problem, because the client may feel the only safe recourse is to remain silent. It is probably

[59] *See* WIGMORE § 2326.
[60] NCM 59–01255, Bennett, 28 C.M.R. 650 (1959).
[61] MCM ¶ 151*b*(2) refers to ¶ 152 as dispositive.
[62] *See* MCM ¶ 151*c*.
[63] Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953).
[64] *See* MCCORMICK 162.

for this reason that some thought has been given to silencing the eavesdropper as well.[65]

G. *COMMENT*

The civilian courts have been in conflict for many years over the question of drawing adverse inferences from the invocation of the privilege. Unlike the general rule prohibiting any comment or inference from the failure to testify for fear of compulsory self-incrimination, the rule as to privileged communication has run both ways. In *Philips v. Chase*,[66] a case cited often by those in favor of comment, the court states:

> [I]f evidence is material and competent except for a personal privilege of one of the parties to have it excluded under the law, his claim of privilege may be referred to in argument and considered by the jury, as indicating his opinion that the evidence, if received, would be prejudicial to him.[67]

Professor Wigmore, however, concludes that no unfavorable inference may be drawn by the triers of fact from the exercise of the privilege,[68] and this view, possibly representing the majority, has appeared in a number of jurisdictions.[69]

There appear to be no decisions in the military courts dispositive of the issue. However, in a case[70] dealing with the accused's privilege to preclude adverse testimony of his spouse, an Air Force board of review found no prejudicial error where the prosecution called the accused's wife, in a larceny case, only to have the accused object to her testimony. The board stated that the prosecution had a legitimate right to call any competent witness and until objection was raised, the government could not know in advance the privilege would be asserted.

H. *TERMINATION*

The title of this section is misleading. While the physical relationship between attorney and client may draw to an end, the rights and duties under the privilege are never extinguished. Although there must have been a legally cognizable relationship in the beginning, this has been liberally con-

[65] *See, e.g.*, UNIFORM RULES OF EVIDENCE 26(1)(c), which provides that the privilege applies if the eavesdropper acquired the knowledge in a manner not reasonably to be anticipated by the client.

[66] 201 Mass. 444, 87 N.E. 755 (1909).

[67] *Id.* at 450, 87 N.E. at 758.

[68] *See* WIGMORE § 2322.

[69] *See* United States v. Foster, 309 F.2d 8 (4th Cir. 1962); A.B. Dick Co. v. Marr, 95 F. Supp. 83 (S.D.N.Y. 1950).

[70] *See* ACM 17828, Lee, 31 C.M.R. 743 (1962).

strued by military courts in extending protection of the privilege to the accused whenever it was necessary to resolve a doubtful situation.

In civilian courts, the privilege operates to prevent an attorney ever revealing the contents of confidential communication with his client.[71] This typically survives the death of the client except in certain cases where the law has been modified to prohibit abuse or injustice, as in the case of will contests.[72] This in-court protection, however, is valueless unless the attorney is ready to maintain professional confidence outside the courthouse. The revelation of conversation or the disclosure of confidential documents, by design or inadvertence, may be as damaging in a derivative way to the adversary as any divulgence in court. There are few statutes in the United States which provide a remedy to the client whose confidence has been breached,[73] although the pratice is not unknown in Europe.[74] Primarily, out-of-court disclosure is a matter of professional ethics. Canon 37, ABA Canons of Professional Ethics,[75] outlines the duty of a lawyer to preserve his client's confidences. Wrongful disclosure by an attorney, in violation of the Canon, which is far broader than the privilege operating in the courts, may result in disciplinary or punitive action by the local bar organization. An example of the scope of the ethical prohibition is found in a case wherein communications

[71] *See* United States v. Foster, 309 F.2d 8 (4th Cir. 1962), which indicates the accused is entitled to have his attorney honor the privilege even though the relationship has ceased, when information and data in the attorney's possession have been obtained in the course of such relationship.

[72] *See* WIGMORE § 2323.

[73] *See, e.g.*, TENN. CODE ANN. § 29-307 (1955), providing for a fine, imprisonment, and disbarrment for an attorney testifying about confidential matters.

[74] C. PEN. art. 378 (Fr. Dalloz 1966).

[75] "Confidences of a Client.

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client. If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

from the family of the client to the attorney were held to be fully protected from disclosure."[76]

The military attorney is no less bound by the duty to preserve his client's confidences, nor is he relieved from the tenets of professional ethics."[77] He is, moreover, put to the test of his ethical convictions far more often than the civilian attorney because of the nature of the professional services and functions he performs. It would be exceedingly strange, for example, for a civilian prosecutor and a criminal defense lawyer to change roles periodically, or even stranger, to share the same general office area. The Court of Military Appeals recognized early the burdens placed upon military counsel and the necessity for encouraging strict adherence to the rules governing the attorney-client relationship. In the protection of the accused's rights, the Court has reiterated many times that it is not only the existence of evil which must be avoided, but the appearance as well.

Both the *Uniform Code of Military Justice*[78] and the Manual[79] imply that once the accused accepts appointed counsel, the attorney-client relationship arises, and such counsel shall represent the accused throughout the proceedings. Although article 37 of the Code requires no showing of good cause for relief of counsel after arraignment, the decision in *United States v. Tellier*[80] indicates that any implication that good cause need not be shown is erroneous. Substantially, then, the working relationship between attorney and client may not be terminated in an arbitrary or whimsical manner by the convening authority.

The duty owed by the defense counsel to his client, regardless of the stage in the proceedings to which he was related, does not end with the trial and, with remote exceptions, he may never take a position substantially adverse to the active advocacy of his former client, even though that position may not involve disclosure of attorney-client confidences.[81] This position is largely subsumed by article 27 of the Code, dealing with

[76] *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 23 (1930) [hereafter cited as ABA OPINIONS].

[77] *See* United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).

[78] Art. 38 [hereafter called the Code and cited as UCMJ].

[79] MCM ¶ 61*f*.

[80] 13 U.S.C.M.A. 323, 32 C.M.R. 323 (1962).

[81] *See* ACM 18593, Clemens, 34 C.M.R. 778 (1963), *pet. denied*, 34 C.M.R. 480 (1964).

adverse positions of counsel, but there is a consistent, close relationship to the privilege in cases dealing with conduct of counsel subsequent to legal assistance interviews,[83] pretrial matters not otherwise obtainable by the government.

A witness granted full immunity from prosecution by the convening authority has the same right to the privilege as any other client and, when cross-examined by the defense concerning privileged matters, may properly refuse to answer.[84] However, in *United States v. Stringer*,[85] after the defense counsel gained a grant of immunity for one of the suspects charged with larceny, he shifted to assistant trial counsel in the trial of the co-defendants. His prior participation, the Court held, did not prevent his acting for the prosecution where there was nothing to show he gained intimate knowledge of confidential matters not otherwise obtainable by the government.

I. *ETHICAL CONSIDERATIONS AND THE FUTURE CRIMES EXCEPTION*

As noted earlier, the discussion of privileged communications in the attorney-client relationship raises questions concerning ethical issues. The Canons of Professional Ethics may provide a guideline, but in the final analysis they are only a rather coarse web of policy for the lawyer who must solve the interstitial problems of daily practice. This practice, for our purposes, is confined to the criminal law. But, in the criminal law lies the very heart of privileged communication and its basic reason for being.

Typically, any advice given in the legitimate defense of a past crime is privileged. This privilege, however, applies only to the courtroom, and leaves to the ethical integrity of the attorney the protection of confidences elsewhere. Closely related to this consideration is the principle which exempts from the privilege any advice given in furtherance of a contemplated crime. The problem lies in the frequent abuse of these principles by courts which attempt to justify decisions concerning privileges by allusions to ethics and accessorial conduct. When considered

[83] *See* United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).
[84] *See* United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955).
[85] *See* ACM S–19619, Daigneault, 30 C.M.R. 918 (1961).
[85] *See* United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).
[86] 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954). *Accord*, United States v. Patrick, 8 U.S.C.M.A. 212, 24 C.M.R. 22 (1957).

separately, the rules are clear and nearly elementary, but when they are all considered in one factual setting, the courts often strain to arrive at a rational conclusion.

Professor Wigmore handles the contemplated crimes exception by finding no professional relationship extant where a client seeks advice concerning the perpetration of a future crime, since it is not an attorney's function to render advice under such circumstances.[87] This allusion to the basic tenets of the privilege is particularly important, since it eliminates additional rules which require constant interpretation and result in far less certainty and uniformity. Where the crime is never actually perpetrated, of course, any discourse relating to it is privileged.

The ABA Committee on Professional Ethics and Grievances has generally offered a very broad interpretation of the lawyer's obligation to preserve his client's confidence.[88] And, on the other hand, a rather narrow interpretation of a lawyer's responsibility to divulge the knowledge of a wrongful act.[89] Thus, Canon 41, which requires that an attorney rectify an act or fraud or deception practiced upon the court or a party, was refused application by the Committee in a case of perjury by the client.[90] Typically, it must be shown that the client intended the wrong and the attorney knew of the wrong at the time of consultation. According to one opinion by the Committee, Canon 37 (Confidences of a Client) does not include the bare assertion of the client that he intends to commit a crime, but it likewise imposes no duty on the attorney to divulge the information. Thus, an attorney learning that his client has used his advice in the course of a wrongful act, has no obligation to disclose it since he learned of it after completion.[91] However, the attorney may be compelled in court to disclose the confidential communications because the legal advice was used to commit a crime after consultation. The courts, recognizing the difficulty in proving a consultation in furtherance of a crime and the propensity of the privilege for cloaking criminal activity, typically require that one who seeks

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[87] *See* WIGMORE §§ 2298–2299. *See generally* Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A.J. 708 (1961).
[88] *See* ABA OPINIONS, No. 23 (1930).
[89] *See* ABA OPINIONS, Nos. 268 (1945) and 287 (1953).
[90] *See* ABA OPINIONS, No. 287 (1953).
[91] *See* ABA OPINIONS, No. 202 (1940).

to avoid the privilege need only advance evidence from which the existence of an unlawful purpose could reasonably be found."[32] Military courts follow the general crimes exception rule, although there has apparently been little need to employ it."[33]

The case for not including future crimes within the privilege has substance in the reports of trials and the opinions of the ABA Committee on Professional Ethics and Grievances. However, a more difficult problem arises when, by virtue of a confidential relationship, the attorney has evidence, testimonial or real, which is clearly adverse to his client's interests. There is the case of the rapist who gives his lawyer a diary outlining the offense for which he is presently accused, and others, all of which are thoroughly documented. And, the case in which a lawyer is given the bloody knife or the pistol. There is the case in which the lawyer knows of his client's whereabouts, knows of his guilt, knows he's a fugitive from justice, but refuses to divulge any information to police investigators. And, then there is *Clark v. State*,[34] introduced earlier,[35] in which the attorney advised his client, by telephone, to destroy the murder weapon, and later objected to its revelation.

Here, then, the obligation of the attorney to maintain the confidences of his client and his duty to pursue and uphold justice seem to conflict. Moreover, the position has been taken that they do conflict and that the attorney should serve first his client, and then the ends of justice. Mr. Charles P. Curtis, of the Boston bar, put it this way:

> A lawyer is called on the telephone by a former client who is unfortunately at the time a fugitive from justice. The police want him and he wants advice. The lawyer goes to where his client is, hears the whole story, and advises him to surrender. Finally he succeeds in persuading him that this is the best thing to do and they make an appointment to go to police headquarters. Meanwhile the client is to have two days to wind up his affairs and make his farewells. When the lawyer gets back to his office a police inspector is waiting for him, and asks him whether his client is in town and where he is. Here are questions which the police have every right to ask of anybody, and even a little hesitation in this unfortunate lawyer's denials will reveal enough to betray his client. Of course he lies.

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[32] *See* Clark v. United States, 289 U.S. 1 (1933).

[33] MCM ¶ 151*b*(2) precludes operation of the privilege where "such communications clearly contemplate the commission of a crime—for instance, perjury or subornation of perjury."

[34] 159 Tex. Crim. 187, 261 S.W.2d 339 (1953).

[35] See text accompanying note 1 *supra*.

> And why not? The relation between a lawyer and his client is one of the intimate relations. You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself. At what point do you stop lying for them? I don't know and you are not sure.
>
> To every one of us come occasions when we don't want to tell the truth, not all of it, certainly not all of it at once, when we want to be something less than candid, a little disingenuous. Indeed, to be candid with ourselves, there are times when we deliberately and more or less justifiably undertake to tell something less or something different. Complete candor to anyone but ourselves is a virtue that belongs to the saints, to the secure, and to the very courageous. Even when we do want to tell the truth, all of it, ultimately, we see no reason why we should not take our own time, tell it as skillfully and as gracefully as we can, and most of us doubt our own ability to do this as well by ourselves and for ourselves as another could do it for us. So we go to a lawyer. He will make a better fist of it than we can.
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> I don't see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is. Happily they are few and far between, only when his duty gets him into a corner or puts him on the spot. Day in, day out, a lawyer can be as truthful as anyone. . . .[96]

This article was met with something less than warmth by his fellows at the bar and evoked the following from Mr. Henry Drinker, Chairman of the ABA's Committee on Professional Ethics and Grievances:

> At the invitation of the president of the *Review* that I comment on the article in the December number by Charles P. Curtis of the Boston Bar on "The Ethics of Advocacy," I read the article with amazement and indignation; amazement that a lawyer of more than thirty years' experience and member for twenty years of a distinguished firm, should have so low an opinion of his profession; indignation that he should publish, to be read by law students and young lawyers, so many distorted and misleading statements as to the lawyer's duty to his clients, to the courts, and to the public.
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> . . . .
>
> Of course no one could say that an occasion might not possibly arise when there was no alternative except the truth or a lie and when the consequences of the truth were such that the lawyer might be tempted to lie. This, however, would not make it right for him to do so. When Mr. Curtis intimates that in his opinion a lawyer's duty to his client is higher than that to the court, he ignores the established principle of privileged communications. At the very beginning of the development of the common law, it was agreed by lawyers, judges, and legislators and embodied in decisions, in statutes, and in canons of ethics that in order to encourage the client to tell his whole story to the lawyer, facts which the client

[96] Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8–9 (1951).

> disclosed to his lawyer are "privileged" and may not be disclosed by the lawyer without the client's permission. . . .
>
> . . . It was for this reason that the lawyer could not tell the police officers where his client had telephoned him that he was hiding. When the police officer asked the lawyer, there was not necessity for him to lie. He should have said: "If I knew, my duty as a lawyer would forbid my telling you." [97]

Presented are two possible solutions for the lawyer who finds himself with confidential information relating to the location of his client, a fugitive from justice, and an official inquiry as to his whereabouts, as well as some rather provoking discussion of legal ethics. There are many canons of professional ethics which bear on this general problem and which are interrelated with the problem of confidential relations with the client.[98] It is within this framework of canons, opinions, and ideas that the lawyer must make his decision to remain silent or reveal his client's secrets. Needless to say, in the fugitive from justice situation, the decision must be based on the particular facts in issue. But, it should be clear that the solutions proposed by Mr. Curtis and Mr. Drinker reach the same result, which is the purposeful obstruction of bona fide law enforcement operations.

The *Clark* case presents but a minor problem of privileged communication. However, the manner in which the Texas court arrived at its decision to allow the telephone conversation as evidence was a patent example of the obfuscation frequently attending such analyses of the privilege. Simply put, the conversation was privileged only as to the attorney and his client. By the great weight of authority, and the common understanding of the privilege, the client could not expect the court to silence a party not privy to the communication nor acting at the connivance of one of the parties. The court, instead, mired itself in the policy behind the privilege in stating:

> It is in the interest of public justice that the client be able to make a full disclosure to his attorney of all facts that are material to his defense or that go to substantiate his claim. The purpose of the privilege is to encourage such disclosure of the facts. But the interests of public justice further require that no shield such as the protection afforded to communications between attorney and client shall be interposed to protect a person who takes counsel on how he can safely commit a crime.

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[97] Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349–51 (1952).

[98] *See* ABA CANONS OF PROFESSIONAL ETHICS NOS. 5, 6, 15, 16, 29, 37, 41, and 44.

> We think this latter rule must extend to one who, having committed a crime, seeks or takes counsel as to how he shall escape arrest and punishment, such as advice regarding the destruction or disposition of the murder weapon or of the body following a murder.
>
> . . . .
>
> Is such a conversation privileged as a communication between attorney and client?
>
> If the advisor had been called to testify as to the conversation, would it not have been more appropriate for him to claim his privilege against self-incrimination rather than that the communication was privileged because it was between attorney and client?
>
> Appellant, when he conversed with Mr. Martin, was not under arrest nor was he charged with a crime. He had just inflicted mortal wounds on his former wife and apparently had shot her daughter. Mr. Martin had acted as his attorney in the divorce suit which had been tried that day and had secured a satisfactory property settlement. Appellant called him and told him that he had gone to extremes and had killed "her," not "the driver." Mr. Martin appeared to understand these references and told appellant to get rid of "the weapon."
>
> We are unwilling to subscribe to the theory that such counsel and advice should be privileged because of the attorney-client relationship which existed between the parties in the divorce suit. We think, on the other hand, that the conversation was admissible as not within the realm of legitimate professional counsel and employment.
>
> The rule of public policy which calls for the privileged character of the communication between attorney and client, we think, demands that the rule be confined to the legitimate course of professional employment: It cannot, consistent with the high purpose and policy supporting the rule, be here applied.[99]

This discussion of policy, without more, seems to be a direct contradiction of the reasons for condoning assistance to one who has committed a crime and seeks advice. The court examines it as a case in which the client is still in the act of commission and labors to tailor the policy to fit the facts.

The court went on to discuss the attorney's responsibilities as an accessory and in describing the attorney's conduct states:

> One who knowing that an offense has been committed conceals the offender or aids him to evade arrest or trial becomes an accessory. The fact that the aider may be a member of the bar and the attorney for the offender will not prevent his becoming an accessory.
>
> Art. 77, P.C. defining an accessory contains the exception "One who aids an offender in making or preparing his defense at law" is not an accessory.
>
> The conversation as testified to by the telephone operator is not within the exception found in Art. 77, P.C. When the Dallas voice advised

[99] 159 Tex. Crim. at 199–200, 261 S.W.2d at 346–47.

> appellant to "get rid of the weapon" (which advice the evidence shown was followed) such aid cannot be said to constitute aid "in making or preparing his defense at law." It was aid to the perpetrator of the crime "in order that he may evade an arrest or trial."
>
> . . . .
>
> The murder weapon was not found. The evidence indicates that appellant disposed of it as advised in the telephone conversation. Such advice or counsel was not such as merits protection because given by an attorney. It was not in the legitimate course of professional employment in making or preparing a defense at law.
>
> Nothing is found in the record to indicate that appellant sought any advice from Mr. Martin other than that given in the conversation testified to by the telephone operator. We are not therefore dealing with a situation where the accused sought legitimate advice from his attorney in preparing his legal defense.[100]

The problem, then, is determining where the line of accessorial conduct meets the scope of legitimate legal counsel. And, in this case, it apparently, and erroneously, bears on the privileged nature of the conversation. An argument may be made that legal assistance to a client properly begins when he first seeks aid from an attorney; that the attorney-client relationship arises here. It could be strengthened by the fact that the attorney in preparing the accused's defense need not oblige the prosecutor by turning over the murder weapon to him, be it a pistol or bloody knife. Nor is the attorney bound to volunteer any shred of evidence, from the rapist's diary to the drug pusher's list of clientele. And, it might be stressed that destroying evidence of an offense is not necessarily a crime. The subpoena duces tecum may be resisted if it tends to incriminate the accused, and the search warrant is limited to contraband and instrumentalities of the crime. Thus, a lawyer may possess evidentiary material derived from his relationship with his client which is beyond the reach of the courts and concerning which he has only his own ethical standards, bottomed on the professional canons, to guide him.

Illustrated in the *Clark* case is the conflict arising in the application of the rules of privileged communication as they bear upon the ethical—or accessorial—conduct of the attorney. Testimonial communications may provide a less difficult case than real evidence, but the conflict is still there. Is the attorney responsible for preventing the arrest, detection, or conviction of his client, or is he preparing his defense? Bear in mind

[100] *Id.* at 199–200, 261 S.W.2d at 347.

that this is activity taking place after the offense, which places it outside the crimes exception to the privilege.

In this discussion, there can be no line drawn between the military and the civilian attorney. They both are required to bear the standard of ethical conduct demanded by the legal profession just as they both are obligated to present every defense permitted by law in aid of their client.

In the final analysis, the conflict between privilege and public policy becomes three-cornered as ethical and accessorial conduct become relevant. Consider the following hypothetical: Charges have been referred to trial by general court-martial against D, X, and Y. Charge I relates to a conspiracy between the three to commit larceny. Charge II is the substantive offense of larceny. You have been appointed defense counsel for D, and at your first interview with him he admits to his guilt in the affair. However, he insists that you plead him not guilty because his wife and children will suffer financial hardship if he is sentenced to confinement. Later, the trial counsel advises you that he has an "airtight" case against D, but he could seek a grant of immunity for him if he would testify against X and Y in their trial for conspiracy and larceny. When you advise D of this offer he tells you to accept. However, he advises you that X and Y were really not his co-conspirators. Actually, he continues, the larceny was a completely individual effort on his own part. What do you, as defense counsel, propose to do?

J. *A VIEW FROM CONTEMPORARY SOCIETY—DO WE NEED IT?*

Unfortunately, the personal privileges are usually discussed as a group, and it is not difficult to conclude that they are an impediment to the search for truth. The rationale supporting some of them has been outstripped by the advances of the modern law of evidence, such as discovery techniques, which are rapidly being accepted outside the federal courts. Moreover, it is argued that the sophisticated criminal and his sophisticated crimes can not be dealt with successfully by the sporting theory of evidence. Indeed, Rule 26 of the Federal Rules of Criminal Procedure recognizes the need for the courts to stay abreast of the rapidly developing law of evidence in its provision for interpreting the common law "in light of reason and experience." However, when the justification for each of

the privileges is examined apart from the coincidentally parallel rules of application, the error in considering them as a whole is readily apparent.

The original social interests of honor and duty were long ago displaced by the contemporary need for complete confidence in the attorney-client relationship. It is universally recognized that the lawyer plays a key role in the administration of justice, for his job is to provide an adequate, effective defense for anyone charged with a crime. And, effective counsel, it has been illustrated, means more than representation at trial. It requires a relationship between attorney and client in which the client feels free to discuss the entire case and open his conscience without fear that his thoughts and words may come back to haunt him. Here, then, lie the grounds for the attorney-client privilege. The privilege is founded not only upon an interest in protecting a client's confidences, but also upon the recognition that it is essential to his defense under our laws. This was made clear in the *Bennett* case.[101] The close line between effective counsel and privileged communication will continue to be stressed in the courts as long as it is recognized that the privilege is not a mere indicium of prestige or honor to the profession, but a tool as necessary and valuable to the lawyer as the stethoscope to the physician. The privilege is essential to a proper analysis of the case and, unlike any other profession, the lawyer would be crippled in his task if he lost it. Indeed, the privilege may be headed for constitutional sanctity in criminal prosecutions, as closely related to due process as the privilege against compulsory self-incrimination.

The critics of the privilege are vehement in their claim that any privilege is an obstruction to justice and attorney-client relations are no exception. Some would limit it to face-to-face relations, thereby avoiding the much maligned cloak of secrecy cast over the entire relationship.[102] This is based on the belief that such a limitation would not frustrate the accuracy of the fact-finding process and would preserve the values recognized as the bases for the justification of the privilege in the 20th century. In view of the need for the privilege, this position is a practical one since much harsh criticism is founded

[101] NCM 59–01255, Bennett, 28 C.M.R. 650 (1959).

[102] *See* Gardner, *A Re-evaluation of the Attorney-Client Privileges*, 8 VILL. L. REV. 279 (1963).

on the privilege accorded nontestimonial evidence and, in general, evidence without the face-to-face relationship.

Professor Wigmore, not known for supporting privileges in general, has determined that this one does fulfill his standards for justification. However, he goes on to comment, "Its benefits are all indirect and speculative, its obstruction is plain and concrete." [103] The argument that the absence of the privilege would deter only guilty men from seeking counsel is rebutted by Wigmore in his reasoning that an innocent man might naturally withhold facts he thought damaging in order to make a good case better, thereby undermining his own right to effective counsel. Clearly, furnishing counsel only partial information may result in the accused becoming his own best prosecution witness at a trial where the prosecution develops a case for which the defense is unprepared.

Professor McCormick takes the position that the law could do as well without the privilege, but history and custom prevent any such radical change. He suggests that some better reconciliation of the conflicting pulls of sentiment and delicacy on the one hand and of the need, on the other, for full ascertainment of the crucial facts by a tribunal of justice is possible. He agrees that a lawyer must continue to maintain the secrecy of his client's disclosures out of court, but feels that the in-court privilege should be controlled by the judge. Thus, when the judge determined that a particular disclosure was necessary in the administration of justice, he could require it.[104] Although McCormick has long suggested that the probable course of development of the privileges will lead to discretionary rulings by the courts, it is difficult to see how the basic purpose of the privilege can be thereafter sustained. The privilege is based upon the need for establishing an intimate working relationship between client and attorney. If there is no certainty that this confidential relationship will outlast possible prosecution, the privilege disappears. No client will divulge what he believes to be incriminating information if he can be assured only that it will *probably* not be divulged by his own counsel in court. A privilege protected only by the vagaries of a judge or law officer, in turn based upon the adeptness or incompetency of a defense counsel or prosecutor, is no privilege at all.

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[103] WIGMORE § 2291.
[104] MCCORMICK 182–83.

Perhaps one area in the military soon to become fertile for appellate practice is the early consultation of the accused with an attorney. There have been some arbitrary and rather questionable decisions rendered in considering the point at which the attorney-client relationship arises to prevent the testimony of counsel. In most civilian jurisdictions, the relationship arises when the client begins to relate his story to his attorney. Whether the attorney accepts his case or not, the communication is privileged in court by law and out of court by professional ethics. Yet, in the military, it is not uncommon practice for an attorney to interview a suspect for the limited purpose of "advising him of his rights." Effectively, he is not provided with counsel. In *United States v. Slamski*,[105] for example, the attorney told the accused he could not advise him "as his attorney" and refused to discuss the merits of the case or whether the accused should make a statement. Thus, at the time when he needed counsel most urgently, it was refused him. And, to compound this harsh result, no attorney-client relationship is formed, even if the accused blurts out an admission. The attorney may be called to testify against the accused who sought his services.

The above situation illustrates that innovation is needed—either legislative or judicial. In reality, it is a denial of counsel. Additionally, it is a perversion of the rule of privileged communication to allow any attorney, regardless of how vehemently he admonishes the accused to refrain from discussing the facts of his case, to testify against such an accused. Regardless of the manner used to accomplish the task, the certainty and universally accepted benefits of the privilege for confidential attorney-client communications should be accorded all persons subject to military law. The modern emphasis on the right to effective counsel subsumes this privilege.[106]

Military counsel assigned, appointed, or directed to interview an accused party, at any stage in the prosecution, or during the inquisitory period, should do so with the idea that he will furnish complete legal counsel to which the rules of privileged communication attach. This may necessitate ad-

[105] 11 U.S.C.M.A. 74, 28 C.M.R. 298 (1959).

[106] *Ed.*—This article was written prior to the decisions in Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), which decisions would seem to strengthen, if not require, the author's contention that the privilege should be extended to all consultations with attorneys at the investigative stage.

ministrative change in some military law offices, but it will keep the military abreast of the federal courts in providing the benefits of effective legal counsel. And, after all, this is what the Court of Military Appeals has been striving toward for over a decade.

III. THE PRIVILEGE FOR MARITAL COMMUNICATIONS

A. *GENERAL*

This privilege, often confused with the incompetency of spouses to testify adversely to each other, generally prohibits introduction as evidence any interspousal communications made in confidence during a valid marriage. In order to resolve possible language problems, the privilege discussed in this section is referred to simply as a privilege, while spousal incompetency is referred to by that title. The Manual categorizes this personal privilege with that of attorney-client[6], subjecting it to the same rules and justification.[107]

There are several distinguishing features of this privilege which serve to classify it apart from spousal incompetency and to better define it. Perhaps the most apparent is its permanency. The privilege does not terminate upon a breach in the marital relation but lives on in perpetuity, as does the attorney-client privilege.[108] There is, of course, no ethical basis to apply the privilege outside the courtroom. Although the permanency of the privilege may result in harsh circumstances, particularly in the case of death, American jurisdictions have chosen this course. Another distinguishing feature is that, while this privilege may be asserted regardless of the nature of the communcations, the spousal incompetency rule may be invoked only when testimony is adverse to the interests of the spouse. But probably the most critical aspect of distinction lies in the fact that the privilege operates to prohibit testimony of a spouse only upon matters of a confidential nature transpiring during the marriage relation, while the incompetency bars all adverse testimony regardless of source. It is on this point that the critics attack the incompetency as a genuine obstruction to justice, while the privilege may be justified on its more restricted foundation of confidentiality.

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[107] *See* MCM ¶ 151*b*(2).
[108] *See* McCormick 178.

B. *HISTORY*

There is some disagreement upon the common law roots of the privilege, but there is general assent on its derivation from the early rule of complete spousal incompetency.[109] As the other early incompetencies met with increasing criticism, it became apparent that spousal incompetency held some merit in that it protected the confidences of marriage from compelled disclosure. In 1853 an act[110] was passed in England abolishing the spousal incompetencies, but it incorporated the privilege of marital communication made in confidence during marriage. Provision for the privilege is made by statutes in most jurisdictions of the United States. It is generally understood that they are based upon common law. The federal courts have allowed the privilege in criminal cases, and this does not seem to conflict with the intent of Rule 26, Federal Rules of Criminal Procedure, which requires evidentiary matters to be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.[111]

C. *RELATIONSHIP*

The substance of the privilege is a valid marriage,[112] and confidential matters transpiring outside the marital union are without the privilege.[113] The parties must be married at the time of the communication, and the fact of marriage at the time of trial has no relevance.[114] However, this general rule appears to have been tempered in at least one case in which a Navy board decided that no privilege should be accorded in a situation where a husband had left his wife for 22 months and had married two other women in the interim.[115] The board declared that the marriage had long since ended when the husband sent a letter to his wife containing certain ad-

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[109] *See id.* at 169.

[110] 16 & 17 Vict., c. 83; *see* HOLDSWORTH 197.

[111] *See* Duval v. Humphrey, 83 F. Supp. 457 (W.D. Pa. 1949).

[112] LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 239 (1951) [hereafter cited as MCM BASIS].

[113] *See* CM 410090, James, 34 C.M.R. 503 (1963). Legal separation, no privilege obtains. Likewise, a communication made before marriage is not privileged even though parties are married at time invoked. United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944).

[114] *See* Pereira v. United States, 347 U.S. 1 (1954).

[115] *See* WC NCM 62-00346, McDonald, 32 C.M.R. 689 (1962).

missions, and since no privilege existed, it was introduced as evidence against him in court.

Despite the utility of the privilege, however, the typical case features a marital relationship at the time of trial, and the rule of spousal incompetency, which bars any adverse testimony from the spouse, is more often invoked.

D. *CONFIDENTIALITY AND THIRD PARTIES*

The requirement for confidentiality is no less a requisite here than in the other personal privileges, although many real problems may develop simply because marital communications are not generally confined to the closed offices of a professional. Nevertheless, it is the requirement for confidentiality which sets this privilege far above spousal incompetency in practical justification. And in most cases, a careful examination for confidentiality will eliminate the need for examining the myriad rules accompanying most statutes. Communications in private are generally assumed to be confidential.[116] The nature of the relationship dictates this. The intervention of any third party,[117] unless it be a child of the family too young to comprehend,[118] breaches the conjugal confidence and destroys the privilege.[119] The breach of confidentiality destroys the privilege whether intentional or unintentional, as in the other privileges, but a breach caused by the design or connivance of one spouse is not fatal to the privilege under the Manual rules.[120] The intervention of an eavesdropper, unknown to the parties, does not affect the privilege as between them, but the privilege does not prohibit the eavesdropper from testifying.[121] This curious rule, followed in a majority of states,[122] and applicable to all the personal privileges, may be traced to the requisite for absolute confidentiality in order

[116] *See* Blau v. United States, 340 U.S. 332 (1951).

[117] *See* Pereira v. United States, 347 U.S. 1 (1954).

[118] *See* Fuller v. Fuller, 100 W. Va. 309, 130 S.E. 270 (1926) (presence of 13-year-old daughter rendered communication unprivileged).

[119] *See* Wolfe v. United States, 291 U.S. 7 (1933) (letter from defendant husband to wife, dictated to secretary, was not privileged); United States v. Brunner, 200 F.2d 276 (6th Cir. 1952) (wife's knowledge of husband's location was not privileged when mailman also knew of it, and wife could testify to destroy husband's alibi in a mail fraud case).

[120] MCM ¶ 151*b*(2). However, not all states choose to follow this latter rule and vitiate the privilege even if one spouse has in fact been betrayed by the other. McCORMICK 174.

[121] *See* McCORMICK 174.

[122] *See id.*

to have a viable privilege and the countervailing desire to present all probative evidence available to the tribunal.

When a written communication falls into the hands of a third party, the rule applicable to any intervention obtains and the communication ceases to be privileged.[123] In *United States v. Higgins*,[124] a written communication from the defendant husband to his wife, found by investigators in her purse while conducting a lawful search in her bedroom, ceased to be privileged and was admissible.

The fact that there is no ethical standard to back up the privilege outside the courtroom often results in deliberate disclosure of the confidential matter by one spouse to the detriment of the communicating spouse. In the *Sieber* case,[125] a vengeful ex-wife related to authorities the fraud perpetrated by her husband in his false application for a regular army commission. The authorities obtained independent, nonprivileged evidence through their subsequent investigation, and this was deemed to be admissible in his prosecution. The rule, which prevents such breach of privilege by maliciousness or connivance, is inoperative in this situation. The defendant's ex-wife did not testify against him, and no evidence of the confidential matter was introduced at the trial. Thus, no derivative rule was established, and the Court expressly pointed out that such a rule was promulgated by the United States Supreme Court only to discipline government officials. Here, their activity was entirely proper. In the *Higgins* case, the intervention by a third party was without the connivance of either spouse, and the confidential communication itself was admissible in the absence of any privilege. The Manual rule according the privilege in the face of malicious disclosure[126] is therefore helpful only to a limited extent in the marital privilege. A better rule would prohibit one spouse from betraying the confidence of the other outside as well as inside the courtroom. In the absence of a derivative rule, however, this is presently impossible.

E. *SUBJECT MATTER OF THE COMMUNICATION*

The scope of communication generally includes any expres-

[123] *See* Dickerson v. United States, 65 F.2d 824 (D.C. Cir. 1933), illustrating the rule in federal courts; letter to wife from husband, charged with her murder, was admitted when found and turned over to prosecution.

[124] 6 U.S.C.M.A. 308, 20 C.M.R. 24 (1955).

[125] United States v. Seiber, 12 U.S.C.M.A. 520, 31 C.M.R. 106 (1961). *But cf.*, United States v. Winifree, 170 F. Supp. 659 (E.D. Pa. 1959).

[126] *See* MCM ¶ 151*b*(2).

sion—verbal, written, or by conduct—meant to communicate an understanding. It would include nodding the head or pointing out a direction, but it would not include secreting a physical object with the opposite spouse.[127] A major inquiry bears upon the confidentiality of the subject matter. Any act done in the presence of third parties, regardless of what is meant to be communicated, is not privileged. Similarly, the husband must intend to take his wife into his confidence in performing any act if he intends it to be privileged. There is considerable disagreement, however, as to the applicability of this reasoning. States which limit communication to actual expressions—verbal or nonverbal—have little difficulty in dismissing any claim of privilege where the spouse had no intent to communicate in confidence. This appears to be the federal rule.[128] However, many states take the contrary and less tenable position that any act done in the privacy of marriage is privileged.[129] Although this latter view seems unjustified according to both Wigmore[130] and McCormick,[131] it is important to realize that under the rules of spousal incompetency it is sustained in the great majority of state jurisdictions as well as the federal and military courts. The parties need only remain married to qualify for it.

The scope of the military rule is left unanswered in the Manual. Federal court cases, however, have limited this privilege to communicative expression, and there is little reason to believe the military rule would be extended beyond the federal rule. This is confirmed, indirectly, in the *Parker*[132] case. There, spousal incompetency, not marital privilege, was urged to prevent a wife testifying about her husband's sodomous relations with a male friend which she had discovered one evening.

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[127] *See* United States v. Ashby, 245 F.2d 684 (5th Cir. 1957) (income tax evasion, husband's business records given to I.R.S. by wife, not communications, and not privileged).

[128] In Blau v. United States, 340 U.S. 332 (1951), the husband knew of his wife's whereabouts from information she gave him, and therefore this fact was privileged. If, however, he had gained this information without expression by her, no privilege would obtain; United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944), wife's testimony as to husband's act of taking money from her was not privileged.

[129] In State v. Robbins, 35 Wash.2d 289, 213 P.2d 310 (1950), the court allowed as privileged the fact that husband waited in stolen car while wife applied for its registration, and wife was not obliged to testify.

[130] *See* WIGMORE § 2337.

[131] *See* McCORMICK 171.

[132] United States v. Parker, 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963).

After a lengthy discussion, the Court determined that there was insufficient proof of a questioned divorce and the wife's testimony should have been precluded. If noncommunicative expression had been allowed, the discussion of marital status at the time of trial would have been irrelevant, because the privilege, which is based on marriage at the time of communication, would have provided for exclusion.

The Manual provision accords the benefit of this privilege to the communicating spouse, and it follows that only the communicating one may waive it. This view, approved by Professor Wigmore,[133] generally prevails and is found in both federal[134] and state court decisions.[135] The holder of the privilege may waive it by express consent, by failure to make a timely objection, or by introducing the issue himself. In *United States v. Trudeau*,[136] the defendant husband was charged with indecent acts with a minor. When he testified concerning a conversation with his wife, the Court found no error in allowing the wife to testify over his objection as to her version of the conversation. The Court reasoned that the privilege was not meant to cloak falsehoods. However, as in several cases, the Court speaks in terms of both the privilege and the incompetency. It refers to confidential communication, yet it quotes the Manual provision for incompetency.[137] This careless use of language has added to the confusion in applying the two rules of evidence both in the military and civilian jurisdictions.[138]

Although not in the nature of a true waiver of the privilege, there is a further exception to its use. Where the addressee spouse is actually the injured party in a criminal action, the defendant spouse has no privilege to prevent disclosure of confidential information.[139] The Manual makes no provision for this exception,[140] but it is very likely that the rule applicable

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[133] *See* WIGMORE § 2340.

[134] *See* Fraser v. United States, 145 F.2d 139 (6th Cir. 1944).

[135] *See* Patterson v. Skoglund, 181 Ore. 167, 180 P.2d 108 (1947).

[136] 8 U.S.C.M.A. 22, 23 C.M.R. 246 (1957).

[137] MCM ¶ 148*e*. "When the privilege does exist, it may be waived by the consent, express or implied, of both spouses to the use of one of them as a witness against the other."

[138] *See* MCCORMICK 176.

[139] *See* WIGMORE § 2338. In addition to compiling the statutes, Professor Wigmore states that, in the absence of a statute, the common law rule pertaining to this exception in the spousal incompetency rule would likely carry over and apply.

[140] MCM BASIS 239 cities Wigmore as the Manual rule.

to spousal incompetency[141] would be permitted in light of the prevailing view in state[142] and federal[143] courts, and the penchant of the Court to commingle the two rules.

F. *A VIEW FROM CONTEMPORARY SOCIETY— DO WE NEED IT?*

The privilege for marital communications occupies a rather sacred position in Anglo-American law, and it is unlikely that any argument could convince more than a minority that it is an obstruction to justice. Professor Wigmore, not known for his support of the personal privileges, applied his celebrated "canons" to it and found that it failed to satisfy the fourth.[144] However, he was not reluctant to add that it nevertheless should be recognized because it satisfied the other three and the societal interest in the protection of the conjugal relation would not permit another position. Professor McCormick, taking the narrower view, sees the ends of justice outweighing the sanctity of marriage, and would allow the privilege only if the judge felt the evidence was substantially uncontroverted and could be proven with reasonable convenience by other evidence.

This dichotomy of views, and its bearing upon justification, must be tempered by the nearly universal application of the privilege. Although there is no independent basis for justification, such as the attorney's use of the privilege in providing professional services, few people could seriously argue that marital confidence should not be protected from public view. Just as the institution of marriage is basic to our culture, the right to privacy in marital relations is fundamental to our legal system. Admittedly, the privilege does serve to obstruct the investigation for truth, but it is based on the principle of confidentiality which provides not only a basis for justification but also casts out the evils associated with the common law incompetencies. Except in a few jurisdictions which provide a statutory privilege more liberal than the typical common law variety, *i.e.*, include noncommunicative expression, this personal privilege poses little threat to judicial process. It is,

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[141] MCM ¶ 148*e*. The exceptions to spousal incompetency are examined in part IV.G. *infra*.

[142] *See* People v. McCormick, 278 App. Div. 191, 104 N.Y.S.2d 139 (1951).

[143] *See* United States v. Walker, 176 F.2d 564 (2d Cir. 1949).

[144] *See* WIGMORE § 2332, in balancing the value of marital privacy against the need for complete disclosure of truth in the courtroom, the courtroom must prevail.

moreover, used far less and is generally overshadowed by the provisions for spousal incompetency found in most jurisdictions which better satisfy the defendant's desire to prevent all adverse testimony from any source within the knowledge of his spouse.

IV. SPOUSAL INCOMPENTENCY

A. *GENERAL*

The difficulties in distinguishing this rule of evidence from the privilege for confidential marital communications relate as much to justification as they do to definition. Both civilian and military courts, in interpreting obscure statutes, have alluded to confidential communications when applying the incompetency doctrine and when, in fact, confidentiality had no bearing upon the issue. In general, spousal incompetency may be raised by the defendant spouse and, in many jurisdictions including the military, by the witness spouse, to prohibit testimony upon any matter reflecting adversely upon a criminal defendant regardless of the source of information. There exists only the requirement that the parties be lawfully married at the time the testimony is to be given,[145] and, except for a narrowly interpreted rule regarding injury to the witness spouse, the incompetency continues during the duration of the marriage. The Manual states the prevailing rule regarding the general competency of spouses to testify for each other, the spousal incompetency relating to adverse testimony, and the rather narrow common law exception for injury to the witness spouse.[146]

B. *HISTORY*

The contemporary evidentiary principle is a product of the ancient common law rules of complete incompetency, which prevented either spouse from being a witness for or against the other in a suit to which the other was a party or had some interest.[147] Although the various rules of incompetency were

[145] See, *e.g.*, State v. McGinty, 14 Wash.2d 71, 126 P.2d 1086 (1942), extending the rule to a marriage after action started.

[146] *See* MCM ¶ 148*e*.

[147] Professor McCormick's view of its origin is expressed in terms of his considerable dislike for the rule in his statement, "Closely allied to the disqualification of [interested] parties, and even more arbitrary and misguided, was the disqualification of the husband or wife of the party." MCCORMICK 144. Professor Wigmore characterizes its origin as a "tantalizing obscurity," but admits that Lord Coke's characterization of husband and wife as, metaphysically, "one person, incapable of testifying against himself," had much to do with its development by early English courts. This, at the beginning of the 17th century. *See* WIGMORE § 2227.

questioned from time to time and fell by the wayside as courts and legislators corrected the inequities, the societal need to protect marriages and preserve marital peace was recognized much earlier as the true justification for spousal incompetency.[148] And so, although we outgrew the need for the disqualification of felons and agnostics, and despite the development of a privilege for confidential martial communication, spousal incompetency lingered on. In its later development, critics[149] and some courts,[150] in an effort to disassociate the idea of complete spousal incompetency from that relating solely to adverse testimony, began calling it a privilege. This characterization presents a more adequate picture of the rule because, indeed, one spouse is competent to testify for or against the other, except when the defendant spouse exercises his prerogative to prohibit the testimony. Professor Wigmore makes the convincing argument that only privileges are subject to waiver by consent.[151] Professor McCormick, contrarily, speaks of the rule as both a disqualification and a privilege, while maintaining that both privilege and incompetency may be waived.[152] However, too often this rule has been mixed into the same hodgepodge as the personal privileges, has frequently lost its identity in the opinions of courts, and has been made to stand on the same justifications as these latter privileges. As a result, this clearly obstructive common law anachronism gains stature from the more respected and conservative privileges for confidential communication. Moreover, the fact that both witness and defendant may claim the rule in many jurisdictions sets it apart from the personal privileges which allow assertion by only one party. In this respect, the double privilege more nearly approximates complete incompetency. It is for these reasons that the two evidentiary principles are distinguished herein as privilege and incompetency.

Today the majority of jurisdictions in the United States

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[148] Barker v. Dixie, 95 Eng. Rep. 171 [K.B. 1736]. Pringle v. Pringle, 59 Pa. 281 (1868), an early United States decision, illustrates the repugnance of judges to allow one spouse to testify against the other contrary to marital peace.

[149] *See* WIGMORE § 2227.

[150] *See* United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944).

[151] *See* WIGMORE § 2242.

[152] *See* MCCORMICK 151.

recognize the rule of spousal incompetency,[153] although many have strayed from the strict common law application, particularly in the area of intrafamily crimes. The federal courts have long recognized the basic tenets of the rule,[154] and more recently have used Rule 26, Federal Rules of Criminal Procedure, as a proper guideline in interpreting the common law.[155] Military courts, following the Manual provision, have generally adhered to the common law interpretation of the rule as set forth by the United States Supreme Court.[156]

C. *RELATIONSHIP—CONFIDENTIALITY DISPLACED*

There is but one qualification necessary for a defendant spouse to preclude admission of adverse testimony by a witness spouse, in the absence of the injury exception, and that is a valid marriage. Critics point to the sheer nonsense of such a rule, despite the most ethereal justification laid in marital peace, because of the illogical situations that may arise. Jeremy Bentham, foe of any limitation in the production of evidence and, curiously, supported by Professor Wigmore in this particular area, hypothesized:

> Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens) evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife; in the other instance, not without having recourse to the testimony of the wife. While one suffers,—capitally, if such be the punishment,—to what use, with what consistency, is the other to be permitted to triumph in impunity?[157]

The common justification for the rule rests upon the preservation of family peace. But, the question has been raised, if

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[153] *See Symposium—The Husband and Wife Privilege of Testimonial Nondisclosure*, 56 NW. U.L. REV. 208 (1961), for a comprehensive summary of statutes.

[154] Funk v. United States, 290 U.S. 371 (1933), introduced the rule that a wife is competent to testify for her husband, but not against him, unless the facts meet the narrow common law exception relating to injury of the witness spouse by the offense. The rule has been extended in at least two federal courts to preclude testimony by third parties concerning evidence given to them by the witness spouse which, from the mouth of the latter, was not admissible. Peek v. United States, 321 F.2d 934 (9th Cir. 1963); United States v. Winifree, 170 F. Supp. 659 (E.D. Pa. 1959).

[155] *See* United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949), a case in which a wife was deemed competent to testify against her defendant husband charged with interstate transportation of money he fraudulently took from her.

[156] *See* United States v. Massey, 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965).

[157] Bentham, 5 RATIONALE OF JUDICIAL EVIDENCE 332, 340–41 (1827), as quoted in WIGMORE § 2228.

this is so, then the children should be included within the relationship as well as the husband and wife. However, this idea gained little favor in the courts and, although the practicality of one was never convincingly proven over the other, only the husband and wife relationship remained viable. In an entertaining excerpt from his practice (1838), Judge Cockburn indicated his scorn for the "option" which allowed not only spouses to refuse to testify against each other, but children as well.

> Some people think it cruel, and conducive to perjury, to compel parents or children to give evidence against each other . . . . [I]t occurred to some of the judges, about twenty years ago, that, as the indulgence was granted solely from delicacy to these relations, it was competent to them to reject it if they chose. They therefore introduced *The option*, by which parents and children might hang each other or not, just as they pleased . . . . A father may cut his wife's throat with complete safety, provided he takes care to perform the operation before nobody but her ten grown-up sons and daughters.
>
> In the case at Perth, a man called Murray was charged with having forged his son's name. But the son, who alone could prove the forgery, took advantage of this notable option, and refused to answer, on which the witness and the accused walked out of the Court arm in arm . . . .[158] [Italics in original.]

Proof of marriage may be made without producing a marriage certificate and may be proven by the testimony of one present at the marriage; a marital relationship shown to exist is presumed to exist until the contrary is proven.[159] Upon divorce or legal separation, the court record is the best evidence of a judgment or degree, but evidence by one who has personally examined the record of the court and has produced an examined copy thereof would be admissible.[160] Parties to a common law marriage, valid in the jurisdiction where contracted, are accorded the rights of the marital relationship under the rule.[161] But, the rule will not be applied where the parties have submitted to a marital relationship which is a legal sham in order to carry out an independent fraudulent scheme.[162] The provision for spousal incompetency ceases upon

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[158] COCKBURN, CIRCUIT JOURNEYS 19–21, 69–79 (1888), as quoted in WIGMORE § 2228.

[159] *See* United States v. Parker, 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963).

[160] *Id.* at 116.

[161] United States v. Richardson, 1 U.S.C.M.A. 558, 4 C.M.R. 150 (1952).

[162] *See* Lutwak v. United States, 344 U.S. 604 (1953). Here, a foreign national female married a U.S. citizen to gain entry to the United States under the War Brides Act. There was never an intent to cohabit, and the Court held that the "wife" was competent to testify against her "husband."

termination of the marriage, after which time a spouse may be compelled to testify unless it can be found that the evidence sought was a confidential communication made during the life of the marriage.

D. *SUBJECT MATTER*

The subject matter of this rule is limited only to evidence adverse to the interests of the defendant spouse. There is no need to distinguish communicative and noncommunicative expression, as in the privilege for confidential marital communication, because the spouse is prohibited from testifying adversely relative to information from any source. It is interesting to note that jurisdictions which do allow noncommunicative expression within the scope of their privilege statute, are in fact approaching a rule of incompetency without the requisite of a subsisting marital relationship. A divorced wife, for example, could not be compelled to disclose information concerning criminal acts of her husband perpetrated within her view but not meant to communicate any thought to her. The irrational nature of such an extension to the privilege is clearly apparent, but it serves only to illustrate the problem of justifying spousal incompetency when a marriage is foundering and one spouse is willing to assist in the prosecution of the other.

E. *WHO MAY ASSERT THE RULE?—WAIVER AND COMPELLABILITY*

Any examination of waiver should be preceded by a determination of who may assert the rule. Generally, it suffices to say that a party may waive it by consent, either express or implied, in much the same manner as the personal privileges. The Manual provision[165] allows for cross-examination of one spouse who testifies on behalf of the other but limits it to issues on direct examination. Many courts permit both parties to assert the rule. Thus, a defendant spouse may forfeit his right of assertion by waiver and still accrue its benefit if the witness spouse invokes it. Any discussion of justification for the rule, therefore, must include the court's authority to compel the testimony of a witness spouse.

The justification for the rule commonly advanced is the preservation of marital peace and harmony. It seems to follow, therefore, that unless both parties may assert the rule, this

[165] MCM ¶ 148*e*.

justification may be destroyed. As Professor Wigmore so artfully puts it:

> In other words, while the defendant husband is entitled to be protected against condemnation through the wife's testimony, the witness wife is also entitled to be protected against becoming the instrument of that condemnation—the sentiment in each case being equal in degree and yet different in quality.[164]

This issue becomes important in only one rather limited circumstance, but its impact upon spousal incompetency is profound. Only when the defendant spouse is denied its use, when the subject of the offense is an injury to the witness spouse, is a real issue raised. In giving both parties a right to preclude adverse testimony, it then becomes impossible for a court to compel the witness spouse to testify, regardless of the extent of injury at the hands of the defendant spouse.

The federal courts have generally accorded both parties the right to assert the rule,[165] although there is little legislative guidance outside of Rule 26, Federal Rules of Criminal Procedure. The District of Columbia statute incorporates this practice.[166]

State statutes and court decisions do not universally follow this view, and a convincing case could be made to support the contrary position by a careful selection of authority. Illustratively, in an older case of physical assault by a husband upon his wife, the injured spouse was compelled to testify despite her objection.[167] The court pointed out that the injury exception was permitted for the protection of a wife as an individual and a member of society. It reasoned that the principle of deterrence in punishment of a wrongdoer is to deter him from committing the offense again, and not simply from selecting a different victim. His offense was against the public and the court decided that she could not waive her competency to testify on behalf of the public. In a more recent California case, the court held that, where a spouse is made competent to testify either by statute or by the common law

[164] WIGMORE § 2241.

[165] *See* Wyatt v. United States, 362 U.S. 525 (1960); Hawkins v. United States, 358 U.S. 74 (1958).

[166] D.C. CODE § 14:306 (1961), "In both criminal and civil proceedings husband and wife shall be competent but not compellable to testify for or against each other."

[167] *See* State v. Bramlette, 21 Tex. Ct. App. R. 611, 2 S.W. 765 (1886), holding attempted murder is an offense against the public and a witness spouse may be compelled to testify.

injury exception, the witness spouse may be compelled to testify.[168] In a recent Ohio case,[169] a husband was tried for assaulting his wife with a dangerous weapon. The appellate authority held that the trial court had not erred in holding the witness spouse in contempt of court for refusal to testify against her husband and incarcerating her in the county jail until she agreed to testify. And, finally, Connecticut provides by statute[170] that one spouse is competent to testify against the other, and may be so compelled.

Conversely, Alabama provides by statute[171] that a witness spouse may not be compelled to testify against a defendant spouse, while various other state court decisions[172] have interpreted their statutes and the common law to preclude any but voluntary testimony of a witness spouse made competent by the injury exception.

The position in military courts was left unanswered until very recently. Although the question was raised in an early case[173] dealing with the injury exception, no position was taken by the Court of Military Appeals because it felt the evidence provided by the wife's testimony had been produced elsewhere and therefore no prejudicial error was present. In the following year, the Court took the more affirmative position that, in its interpretation of the Manual provision,[174] the law officer did not commit prejudicial error in compelling a witness spouse to testify against her husband.[175] Judge Quinn, disagreeing with the idea that only the defendant spouse has a privilege which may be lost by the injury exception, argued that the Manual did not deprive the witness spouse of a similar privilege in the event she did not choose to testify. In regard to the Manual provision, which is oblique at best, there is only the allusion to a 20-year-old English case[176] in the *Legal and*

[168] *See* Young v. Superior Court, 190 C.A.2d 759, 12 Cal. Rptr. 331 (1961), in which the husband was compelled to testify against his wife for shooting him.

[169] State v. Antill, 176 Ohio 61, 197 N.E.2d 548 (1964).

[170] CONN. REV. GEN. STAT. § 54–84 (1960).

[171] ALA. CODE ANN. tit. 15, § 311 (1959).

[172] *See, e.g.*, State v. LaFils, 209 Ore. 666, 307 P.2d 1048 (1957); State v. Dunbar, 360 Mo. 788, 230 S.W.2d 845 (1950).

[173] United States v. Strand, 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

[174] MCM ¶ 148*e*.

[175] *See* United States v. Leach, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956), in which the husband was charged with, *inter alia*, wrongful cohabitation and adultery.

[176] Rex v. Lapsworth, [1931] 1 K.B. 117, holding a wife may be compelled to testify against her husband when she is the victim of the offense.

Legislative Basis for the Manual.[177] The Court, however, sidestepped any positive interpretation of the Manual provision, or justification for either view, by finding no prejudice to the defendant because there was ample other evidence to establish to the defendant because there was amply other evidence to establish the prosecution's case and the wife's testimony was at best cumulative. In 1963, an Air Force board of review[178] agreed that an injured spouse is competent and may be compelled to testify against her husband. The board indicated that paragraph 148*e* of the Manual was dispositive of the issue and, accordingly, a witness spouse could be punished for contempt.

It was not until 1964 that the Court, in an opinion by Chief Judge Quinn,[179] settled the issue in military law. In line with Professor Wigmore's reasoning, it effectively gave both parties the right to assert the rule and thereby held that when a spouse was the victim of the offense she could not be compelled to testify against her husband. Acknowledging the President's right under article 36 of the Code to prescribe rules of evidence for military courts, the Court determined that paragraph 148*e* of the Manual does not embody the minority view, but merely comments upon the prevailing federal court rule. It easily dismissed the legislative basis discussed above and described the ruling in the *Wyatt* case[180] as the prevailing federal rule which it was obliged to follow. This latter decision, citing Professor Wigmore's thesis, indicated that there was no established rule which permitted admission of compelled testimony by an injured spouse against a defendant spouse.

Hopefully, the *Moore* decision will be limited in the future to its particular facts just as the Supreme Court did in *Wyatt*:

> It is a question in each case, or in each category of cases, whether, in the light of the reason which had led to a refusal to recognize the party's privilege, the witness should be held compellable. Certainly, we would not be justified in laying down a general rule that both privileges stand or fall together.[181]

The issue of compellability must be examined in light of the offense charged. Professor Wigmore's rule works well in the

[177] MCM BASIS 235.

[178] ACM 18521, Riska, 33 C.M.R. 939 (1963). The husband was charged with assault to commit murder upon his wife.

[179] United States v. Moore, 14 U.S.C.M.A. 635, 34 C.M.R. 415 (1964). The husband was charged with several counts of assault and battery upon his wife.

[180] Wyatt v. United States, 362 U.S. 525 (1960).

[181] *Id.* at 529.

fact situation of the *Moore* case, where the husband, charged with assault and battery upon his wife, was described as a hardworking soul who held down two part-time jobs in addition to his regular Air Force duties in order to support his pregnant wife and her two children by previous marriages. But, it is no comfort to the public, and hardly justified as preserving marital peace, to allow a spouse to remain silent after she has been abandoned in favor of another woman by her adulterous husband,[183] or upon her survival from the homicidal assault of her spouse.[184] This was recognized by the Supreme Court in *Wyatt*, when it refused to be bound by a general rule and permitted compelling a wife, made the subject of a Mann Act violation by her husband, to testify against him.

It should be clear that just as Professor Wigmore's rule is too inflexible to become standard, the approach in *Moore* is not logical beyond the facts of that case. The public has a right to be protected against criminals just as it has a right to the evidence of every citizen in its courts, and although this may be questioned in the case of a wife-beater, a rule which would allow it to go unquestioned in all other cases is plainly unacceptable.

F. *COMMENT*

Most civilian jurisdictions add to the benefits of the spousal incompetency rule the provision that no inference is allowable from the failure to call the defendant's wife.[185] The rational for this view is based on the idea that any inference permitted would jeopardize the intent of the rule. However, one Air Force board, pointing out that spouses are competent under the Manual, held that a trial counsel "couldn't know" the defendant spouse would exercise the rule until he called the witness spouse.[186] Thus, the defendant was forced to invoke the rule, for whatever adverse inference it might beget, in order to prevent testimony by his wife. That the prosecution ever meant to have her testify is speculative, but the defendant's desire to preclude the testimony was made clear.

G. *EXCEPTIONS TO SPOUSAL INCOMPETENCY*

In the prosecution for the rape of her seven-year-old daughter, the girl's embittered mother was permitted to testify against

[183] United States v. Leach, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956).
[184] ACM 18521, Riska, 33 C.M.R. 939 (1963).
[185] *See* WIGMORE § 2243, summarizing cases and statutes.
[186] ACM 17828, Lee, 31 C.M.R. 743 (1962).

her husband who was the accused party and stepfather of the child.[186] On appeal, the court commented:

> The rule that the injury must amount to a physical wrong upon the person is too narrow; and the rule that any offense remotely or indirectly affecting domestic harmony comes within the exception is too broad. The better rule is that, when an offense directly attacks or directly or vitally impairs the conjugal relation, it comes within the exception to the statute that one shall not be a witness against the other except in a criminal prosecution for a crime committed one against the other. In this sense the commission of rape by a husband upon a third person is not a crime against the wife within the meaning of our statute.[187]

Unfortunately, the "better rule," as expressed by Justice Bessey, is interpreted in various manners. Here, he continues to deny the mother's right to testify, despite the rather obvious appeal to justice for punishment of the crime.

The exception to spousal incompetency, best illustrated in the case where the witness spouse is actually the victim of the defendant spouse's offense, was early recognized in the common law.[188] The injustice manifested by the absence of this necessary exception was generally clear,[189] but the scope of the exception was made unnecessarily narrow. Although personal injury to the spouse was sometimes extended to general wrongdoing, little thought was given to offenses which were disruptive of the marital peace. Professor Wigmore, among other critics, finds this narrow approach extremely difficult to accept because spousal incompetency is primarily justified by its beneficial effect upon preserving marital peace.[190]

State legislation and decisional law have tended to broaden the exception, although it is difficult to say that such practice represents the majority view. Acknowledging that corporal injury to the spouse, desertion or abandonment, and bigamy are acceptable and logical exceptions, contemporary problems have centered around more indirect injury to the spouse. Extramarital sexual relations and sexual offenses with minor children are a current source of controversy. While California recognizes adultery and crimes against children as within the

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[186] Cargill v. State, 25 Okla. Crim. R. 314, 220 Pac. 64 (1923).
[187] *Id.* at 317, 220 Pac. at 67.
[188] *See* WIGMORE § 2239.
[189] 1 EAST, PLEAS OF THE CROWN 455 (1806), "I conceive it to be now settled that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."
[190] *See* WIGMORE § 2239.

exception, thus allowing the aggrieved spouse to testify against the defendant spouse,[191] Michigan[192] and North Carolina[193] reject it where the husband is charged with adultery, and Washington[194] and South Dakota[195] reject it where the husband is charged with incestuous relations with a daughter. Some states have met the problem concerning abuse to children with legislation designed to permit spousal testimony against the defendant parent.[196]

The exception has been applied to injuries affecting the spouse's property as well as his person.[197] But, there is clearly no universal application and many states have rejected any such exception by refusing to let the spouse testify when property is the subject of the offense.[198] Upon reflection, however, this refusal to pit spouse against spouse is not as distasteful as the narrow view concerning corporal injury. The interests of justice are more nearly balanced by the necessity to preserve family peace.

The federal courts have generally been consistent in permitting only the narrowest version of the common law rule, except for a deviation or two involving injury to spousal property. Although the United States Supreme Court acknowledged the demise of complete spousal incompetency in the *Funk* case,[199] it refused to go beyond direct injury to the spouse in admitting exceptions. The position was reaffirmed in the *Hawkins* case,[200] when the Court refused to find any injury to the wife or the marital union in holding that the wife could not be compelled to testify against her husband charged with a Mann Act[201] violation involving another woman. However, in the subsequent *Wyatt* case,[202] it decided the limit had been reached when the

[191] CAL. PEN. CODE § 1322 (Supp. 1965).

[192] *See* Zakrzewski v. Zakrewski, 237 Mich. 459, 212 N.W. 80 (1927).

[193] *See* Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937).

[194] *See* State v. Beltner, 60 Wash. 397, 111 Pac. 344 (1910).

[195] *See* State v. Burt, 17 S.D. 7, 94 N.W. 409 (1903).

[196] *See, e.g.*, Child Protective Act, IDAHO GEN. LAWS ANN. § 16-1624 (Supp. 1965).

[197] *See, e.g.*, People v. Schlette, 139 Cal. App. 2d 165, 293 P.2d 79 (1956) (wife was owner of property, subject of defendant husband's arson); Emerick v. People, 110 Colo. 572, 136 P.2d 668 (1943) (obtaining bonds from wife under false pretenses).

[198] *See, e.g.*, Mead v. Commonwealth, 186 Va. 775, 43 S.E.2d 858 (1947) (forgery of wife's signature); State v. Kephart, 56 Wash. 561, 106 Pac. 165 (1910) (arson of wife's property).

[199] Funk v. United States, 290 U.S. 371 (1933).

[200] Hawkins v. United States, 358 U.S. 74 (1958).

[201] White Slave Traffic Act, 18 U.S.C. § 2421 (1965).

[202] Wyatt v. United States, 362 U.S. 525 (1960).

subject of the Mann Act violation was the defendant's own wife, and not only permitted her to testify but concluded she might be so compelled. In both these decisions, the Supreme Court alluded to Rule 26, Federal Rules of Criminal Procedure, in commenting, "As we have already indicated, however, this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience'." [203]

The federal rule regarding injury to property or invasion of private rights has provided a minimal expansion of the common law exception,[204] although even these cases are divided.[205] The question of just what constitutes an injury is a delicate one, and courts have not been reluctant to avoid the issue whenever possible. In *United States v. Ryno*,[206] the wife was allowed to testify against her husband who was charged with forging her name on her allotment checks. It is not clear whether this was permitted because he had abandoned her or because he had stolen her property. In affirming the decision, the court commented only that the ruling was not prejudicial.

The importance and urgency of a rational interpretation of the injury exception rule in military law is illustrated by a line of cases extending through 1965. The Court of Military Appeals, in formulating the present military rule, was apparently construed the *Hawkins* and *Wyatt* cases as searching for a definitive rule of evidence, bounded by the common law, limiting its scope to corporal injury of the spouse alone. And, with the exception of one case [207] dealing only uncertainly with the problem, it has failed to offer a dispositive opinion regarding an injury to the spouse's property.

The Manual provides eight grounds, based in part upon the common law, for permitting spouses to testify against each other.[208] Whether these grounds are merely illustrative of the

[203] Hawkins v. United States, 258 U.S. 74, 79 (1958).

[204] *See, e.g.*, United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949) (interstate transportation of funds stolen from wife; wife was permitted to testify).

[205] *See* Paul v. United States, 79 F.2d 561 (3d Cir. 1935) (forging husband's name to check; husband's testimony was excluded).

[206] 130 F. Supp. 685 (S.D. Cal. 1955), *aff'd on other grounds*, 232 F.2d 581 (9th Cir. 1956).

[207] *See* United States v. Strand, 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

[208] MCM ¶ 148*e*, (1) Assault, (2) Bigamy, (3) Polygamy, (4) Unlawful cohabitation, (5) Abandonment of wife or children, (6) Failure to support wife or children, (7) Transporting the wife for "white slave" or other immoral purposes, and (8) Forgery of the other's signature to a writing, when the writing would, if genuine, apparently operate to the other's prejudice.

military rule or prescriptive and binding is a question examined in a number of opinions. The question of competency of a witness is a rule of evidence, and under article 36 of the Code the President may properly define the conditions under which such testimony can be received in evidence at a court-martial.[209] It has been recognized, however, that the provision for the exceptional grounds in the Manual is not a rule of law, but only a comment upon the prevailing federal rule.[210] Therefore, the grounds for exception are limited not only by the Manual provisions, but also by whatever construction the Court may place upon decisions of the federal courts. In *Massey*, the Court commented:

> And the wisdom of this policy cannot be doubted, for except where considerations peculiar to the armed services are involved, there is thereby created an integration between the administration of its criminal justice and that in the ordinary Federal courts which renders the mode of accused's trial and punishment dependent upon the nature of his culpability rather than upon the type of tribunal before which he is arraigned.[211]

However, it is difficult to explain this attitude in view of the Court's ruling in the *Smith* case.[212] There, another evidentiary provision in the Manual was described as a rule of law which should be followed despite a contrary and harsher Supreme Court decision. The Court of Military Appeals chose not to follow the federal rule, according the benefit to the accused. It follows, then, that difficulty will be experienced whenever an exception does not fit exactly the provisions of the Manual. The *Leach* case,[213] extending the Manual ground of cohabitation to adultery, was apparently eclipsed by the *Massey* decision which limited the exception to direct injury of the spouse. Thus, it can be said that the Manual provisions are illustrative only if they reflect the Court's interpretation of the prevailing federal rule. They must otherwise be prescriptive. But one may con-

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[209] United States v. Moore, 14 U.S.C.M.A. 635, 34 C.M.R. 415 (1964).

[210] United States v. Massey, 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965).

[211] *Id.* at 249.

[212] United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962). The accused sergeant was charged with lewd and lascivious acts upon the body of his minor daughter. There was a confession and the issue of corpus delicti arose. The Court chose to disregard the Supreme Court rule in Opper v. United States, 384 U.S. 84 (1954), which requires only corroborative evidence tending to support the particular incriminating statements of the accused, in favor of the less harsh rule of paragraph 140*a*, MCM, 1951, requiring corroborating evidence bearing on each element of the crime alleged, except the identity of the perpetrator.

[213] United States v. Leach, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956).

clude that cohabitation is no more a direct injury to the spouse than is adultery. Indeed, based upon this reasoning, the next step could only be the partial rejection of the Manual grounds in favor of the Court's construction of the prevailing federal rule.[213a]

In *United States v. Strand*,[214] abandonment was considered an injury permitting the wife to testify against her husband in a bizarre mail fraud case in which he had acted out his own demise, including fraudulent correspondence from his duty station advising his bride of several days that he was dead and she was not entitled to any benefits. A second ground based on injury to her property rights was considered, but abandonment provided the operative facts. In two cases[215] dealing specifically with property rights, it was determined that the wife did not possess sole title and consequently there was no qualifying injury.

The area of particular interest to the military today, however, is the exception to spousal incompetency based upon crimes which violate the marital relationship, such as sexual offenses and mistreatment of natural or adopted children. While a number of state jurisdictions have chosen to enlarge the exception and include these offenses, the military has rejected any such expansion of the common law rule. The Court of Military Appeals has commented that, for purposes of the injury to the spouse exception, the proper approach is whether the offense charged has a direct connection with her person or property and not upon the outrage to her sensibilities or a violation of the marital bonds.[216]

In *United States v. Parker*,[217] the Court stated that sodomy was not one of the eight crimes excepted in the Manual, and

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[213a] *Ed.*—This article was written prior to United States v. Rener, 17 U.S.C.M.A. 65, 37 C.M.R. 329 (1967), where the Court of Military Appeals, applying the *Massey* decision, held that the spousal privilege was available to prevent the wife from testifying as to charges of unlawful cohabitation and adultery.

[214] 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

[215] United States v. Wooldridge, 10 U.S.C.M.A. 510, 28 C.M.R. 76 (1959) (husband charged with forging wife's name on allotment check; *held*, wife's testimony was inadmissible against him in absence of injury; husband had a property interest in the check); United States v. Wise, 10 U.S.C.M.A. 539, 28 C.M.R. 105 (1959) (wife had left her husband before receipt of check, and effectively renounced her interest in future Class Q allotment checks).

[216] *See* United States v. Massey, 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965).

[217] 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963).

that a wife could not testify against her husband who was charged with having committed this offense upon one of his male friends. The wife found her husband so engaged in their bedroom during a party and related the story to her fellow employees at the military base the next day. The Court commented that preservation of marriage, the basic justification for spousal incompetency, was well illustrated in this case. The husband had related that, after his wife found him in thas compromising position, told her friends about it, and testified against him, he could not love her any more. The marriage was at an end. The record, concluded the Court, justified the rule. The Court relied heavily upon the *Hawkins* decision in which Justice Black commented:

> The widespread success achieved by courts . . . in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.[218]

The actionable words seem to be "unforgivable act." The Supreme Court left itself in a sound position to consider future cases in light of reason and experience. The Court in *Parker* provided itself no similar room for development.

In the intrafamily cases involving physical and sexual abuse of children, the Court has apparently adopted the conceptual justification for spousal incompetency based upon the preservation of marital peace as it is outlined in the *Hawkins* and *Wyatt* decisions. But in doing so, it ignores the practical necessity of examining this justification in each case for evidence of irreparable damage to the marriage by the offense. In the *Massey* opinion, which precluded a wife's adverse testimony in the trial of her husband for carnal knowledge of his daughter, the Court concluded:

> . . . [C]arnal knowledge, even when incestuous, is not a direct injury to a spouse which causes her testimony to fall without the accused's properly invoked privilege. . . . [T]here must be some direct, palpable invasion of, or injury to, the interests of the witness. . . . And while we cannot set out . . . the metes and bounds of the exception, we . . . seek something more than the reprehensibility of accused's misconduct and the outraged sensibilities of his wife.[219]

Judge Quinn, in a dissenting opinion, pointed out that the Manual does contemplate injury to children as an exception by

[218] Hawkins v. United States, 358 U.S. 74, 77–78 (1958).

[219] United States v. Massey, 15 U.S.C.M.A. 274, 282–83, 35 C.M.R. 246, 254–55 (1965).

including them in its provision for "abandonment of wife or children or failure to support them." He reasons that if justification for the rule is family peace, then certainly carnal knowledge of a natural child is as disruptive an injury as failure to support the child. Moreover, he indicated it was fallacious to speak of preserving the marital relationship in a case where all efforts to sustain a viable family life were long ago shattered by the husband's drinking habits, ill-treatment of the wife, and her decision to leave him.

In a well-reasoned brief on the appeal of *Massey*, the Government stressed the fact that the "prevailing federal rule," so often mentioned in *Massey*, is little more than a fiction.[220] Federal courts seldom handle cases of this nature which makes it difficult to find any decisions employing Rule 26 of the Federal Rules of Criminal Procedure. Moreover, confusion in the federal system is exhibited by some courts which refuse to be bound by local rules of evidence, while others accept them.[221]

In *Massey*, the Court based its narrow construction of the federal rule upon several cases unrelated to child injury and, necessarily, unrelated to any consideration of the detrimental effect it would have upon the marital relationship. In the *Hawkins* case, relied upon as illustrating the common law approach of the federal courts, the offense had nothing to do with the defendant's marriage. He was apparently plying his trade of transporting women for immoral purposes and, like bank robbery, it ostensibly had nothing to do with his wife or his marriage. There being no injury to the wife or the marital union, the Supreme Court declined to breach the rule of spousal incompetency. It did, however, intimate that any future decision regarding this rule would be decided upon the facts of the case without consideration of preordained rules. Following this, the *Wyatt* case presented no problem because the testifying wife was the subject of her husband's unlawful trade under the Mann Act and an injury to both her and the marriage was apparent.

Perhaps the most objectionable aspect of the military rule is its complete preoccupation with physical injury and its utter disregard for the mental and emotional health of the spouse, which likewise has an adverse affect upon the marriage. And

[220] Brief for Appellee, p. 10, United States v. Massey, 15 U.S.C.M.A. 635, 34 C.M.R. 415 (1964).

[221] *See generally* Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101 (1956).

the marriage, after all, is what the justification is all about. Paradoxically, this disregard was replaced by genuine concern in the *Moore* decision, which prohibited compelling a witness to testify, although the injury exception permitted it, because of possible damage to the marriage. Irrationally, there is no middle road in *Massey*, allowing the spouse to testify voluntarily or to remain silent if there is hope of saving the marriage. Therefore, unless there is sufficient evidence from other sources, and there frequently is not in the case of very young children, the embittered wife is offered no solace in the military courts.

In retrospect, the cases involving sexual offenses outside the home, such as the sodomy offense in *Parker*, bear only indirectly upon the marital union. A good argument, based on the preservation of marriage, could be made for rejecting any such exception to the spousal incompetency rule. Marriages have been saved after more chaotic incidents than extramarital sodomy. But sexual assault upon a child of the marriage has no such saving attribute. It strikes at the foundation of the marital relationship—the natural product of the union—inflicting mental pain and suffering upon both wife and child. A rule which permits this to go unpunished, despite a mother's desire to protect her child, perverts a fundamental institution of our society, and no argument based upon conceptual justification can sustain it.

The injury exception to spousal incompetency raises a question peculiar to military courts which are bound by the rule to try all charges against an accused at a single trial.[222] Simply put, if the accused is charged with several offenses, one of which involves his spouse as a victim, may she testify against him under the injury exception rule as to all the charges, or will she be limited to the one?

In the *Francis* case,[223] the accused husband was charged with, *inter alia*, assault upon his wife, adultery, and carnal knowledge of his stepdaughter. An Air Force board held that the wife was an injured party under the Manual rule and could therefore testify as to all three offenses. The board logically assumed that the three offenses were all exceptions, based on the assumption that the provisions of paragraph 148*e* of the Manual were merely illustrative. The *Massey* decision makes clear

[222] MCM ¶ 30*f*.
[223] ACM 6822, Francis, 12 C.M.R. 695 (1953).

that this is not true. Consequently, today, it appears that the wife in *Francis* would be permitted to testify concerning only the assault upon her person. The definitive rule laid down in *Massey* precludes any extension of the exception merely because the offense is injurious to the marital union. This would prevent a prosecutor in a close case from rendering a wife's adverse testimony admissible on a charge of adultery because the accused was charged also with cohabitation, one of the Manual's exceptions. As the Court in *Massey* pointed out, ". . . we are satisfied that it is the offense charged against the accused, or a lesser degree thereof, which must govern the issue, . . . and not the fact that evidence in proof thereof tends to establish also the commission of a separate and distinct offense against the spouse." [224]

H. *A VIEW FROM CONTEMPORARY SOCIETY*

The rule of spousal incompetency, although vigorously criticized by leading scholars, tempered by state legislatures, and confused by many courts, has remained as a hoary vestige of the common law. Professor Wigmore succinctly concludes:

> This privilege has no longer adequate reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of feminity as to be willing to enact complete legal and political equality and independence of man and woman, marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice. It is unfortunate that the United States Supreme Court, when handed the opportunity in 1958, [*United States v. Hawkins*], failed to eliminate this relic from the impediments to justice in the federal courts.[225]

It is important to point out that critics attack the justification for the rule as well as its obstruction to justice. Unlike the personal privileges, it has no saving or limiting aspect of confidentiality, but is employed without concern for the source or subject matter of the communications. The privilege for confidential marital communications stresses the need for loyalty and privacy in marital relations, while spousal incompetency speaks only in terms of preserving the marriage. However, many state jurisdictions have remedied this by restricting application of the rule through broadening the injury exception. The United States Supreme Court left this door open in both the *Wyatt* and *Hawkins* decisions.

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[224] United States v. Massey, 15 U.S.C.M.A. 274, 281, 35 C.M.R. 246, 253 (1965).

[225] WIGMORE § 2228.

The Court of Military Appeals has chosen to follow the common law version of the rule, but its conceptualistic approach to justification has resulted in an injury exception which is both inflexible and impractical. Illustratively, it ignores the mental suffering of a mother forced to remain silent about her husband's criminal assault upon her young daughter, and the adverse effect this may have upon the marriage, when a reasonable person might conclude that the gravity and effect of this offense is at least equal to a simple assault upon the wife's person. This is a result of the Court's reasoning that it has a duty to interpret and follow the federal rules concerning evidentiary matters despite the fact that it has ignored them, by choice, in other cases. Its penchant for picking and choosing among the federal evidentiary rules to find the one best suited to the military has been criticized,[225] and its choice, or misinterpretation, in the injury exception area might best be described as unfortunate.

The military must consider realistically the impact of intrafamily offenses upon the marital relation. The continued use of marital peace as justification for spousal incompetency permits no other recourse, and this is reinforced by the statutes and decisions of many state jurisdictions. As a minimum, sexual and physical abuse of children within the family must be recognized as an injury which falls within the exception. The *Moore* decision, which precludes compelling a spouse to testify when a qualifying injury removes the cloak of silence, may be valid on its particular facts, but its language is unnecessarily inflexible. It is difficult to pronounce a rule which covers more than a few factual situations, and state legislatures assuming this task have met with something less than success. The Supreme Court, in leaving the question open for discussion in each case, has probably come closest to a rational solution. We cannot subjugate completely the public interest to a rule of spousal incompetency which may be no more than a speculative attempt to preserve a marriage.

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[225] *See, e.g.*, Rosenwald, *Some Reflections on the Rules of Evidence in Military Courts*, 43 TEX. L. REV. 526 (1965). The author described the Court's decision to reject United States v. Opper, 348 U.S. 84 (1954), both in United States v. Villasenor, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955), and United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962), as illogical because it preaches adoption of the federal rule of evidence as protection for the military accused, yet rejects it here as too harsh.

V. CONCLUSION

A. *GENERAL*

The privileges for confidential communications based upon the common law reflect the great importance attached to the fundamental right of privacy in certain relations. It cannot be disputed that in many situations this right far outweighs the probative value of evidence which violates these privileges. It is unfortunate, therefore, that critics as well as advocates of the personal privileges have chosen to examine them as a single rule, unmindful of the fact that there is no common denominator for justification. The confusion which ensues frequently overshadows the requisite of confidentiality, contributes to the disparagement of all the privileges, and provides hope for the current wave of spurious new privileges which are based more upon professional jealousy than common sense.

Military courts, generally free from the pressures of organized professions, have adhered rather rigidly to the common law privileges accorded both spouses and attorneys. Justification for the attorney-client privilege is virtually undisputed in state and federal courts, as is the spousal privilege for confidential communication. The rule for spousal incompetency—with scant justification for its existence—remains part of military law, although many states have chosen to temper its common law background.

B. *RECOMMENDATIONS*

Military courts have seen few innovations beyond the common law in the area of personal privileges. However, based upon the contemporary experience of scholars and civilian jurisdictions, there seems to be no need for sweeping reform. The following recommendations are offered as a reasonable effort to reconcile apparent gaps between current practice and the justification which underlies the rules.

1. *MCM, para. 148e.*

The rule of spousal incompetency is not likely to disappear from the courtroom despite the continuing attack on its obstructive nature. The Manual should clearly state that it may be asserted by either spouse, but it should also provide that there is no complete bar to compelling an injured spouse to testify when it appears that the defendant spouse may exercise control over the former's volition or that the crime is a serious breach of public peace. The nature of this latter offense may be

represented by homicidal assault vis-a-vis simple assault upon the wife or children.

The injury exception rule should be liberalized to include offenses which violate the marriage relationship. Specifically, this should include sex offenses with third parties and physical or sexual abuse or maltreatment of children. Illustrative of the proposal in the paragraph above, sex offenses with third parties would not be considered a serious breach of public peace, thus the witness spouse is permitted to voluntarily testify or remain silent. The decision of the spouse would be a direct reflection of his or her interest in preserving the marriage.

2. *MCM, para. 151.*

Military counsel must be assimilated more closely to his civilian counterpart in the early stages of professional assistance. Any military attorney who provides advice to a person suspected or accused of a crime should be ready to discuss the merits of the offense under confidential circumstances. A simple disclaimer by the attorney should not be sufficient to deny military personnel the benefits of privileged communication, particularly during the early investigatory processes when no formal appointment of counsel has been made.

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HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
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